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ABSTRACT

This document presents summaries of state and federal special education court cases from approximately 1980 through 1992 and the federal regulations for Part B of the Individuals with Disabilities Education Act (IDEA) as amended through March 1993. Cases are grouped by issue addressed and include a citation and a one-paragraph summary of the decision. The following seven major topics are covered (with sample subtopics in parentheses): (1) qualification for services (residency, age, and qualification under IDEA); (2) due process procedures (Individualized Education Program development and review, notification and consent requirements, and judicial review); (3) student placement (appropriate placement/services, length of day and year, least restrictive environment); (4) related services (psychiatric services and psychotherapy, nursing care, and transportation); (5) disciplining students with disabilities (corporal punishment, suspension, and disciplinary program incorporated into the Individualized Education Program); (6) relief under IDEA (reimbursement for private services, attorney fees, and compensatory education); and (7) financial issues (equal protection, state funding, and state immunity). Additional sections summarize cases specific to preschool, higher education, and employment. A table lists cases alphabetically. The IDEA Part B regulations are presented in the order of the law's various sections. (DB)

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PECIAL EDUCATION LAW: ASE SUMMARIES AND FEDERAL EGULATIONS

by Stephen B. Thomas and Carol A. Denzinger

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Special Education Law: Case Summaries and Federal Regulations

Stephen B. Thomas
Professor & Coordinator
Educational Administration
Kent State University

Carol A. Denzinger
Assistant Director of Children's Services
Portage County Board of Mental Retardation and
Developmental Disabilities
Ravenna, Ohio

NATIONAL ORGANIZATION ON LEGAL PROBLEMS OF EDUCATION
3601 S.W. 29TH STREET, SUITE 223
TOPEKA, KANSAS 66614-2047

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Qualification for Services

Residency Issues

Lapp v. Reeder Pub. Sch. Dist. No. 3, 491 N.W.2d 65 (N.D. 1992). Parents of a child with a profound sensori-neural hearing loss sought reimbursement for boarding care from the district where the instructional facility was located. The court held, however, that the district of family residence, not the district where either the boarding facility or institution was located, was responsible for payments.

Major v. Nederland Indep. Sch. Dist., 772 F. Supp. 944 (E.D. Tex. 1991). The district could not refuse admission of a resident nondisabled student who did not live with her parents. The district had not given proper weight to the fact that the "primary purpose" the student resided apart from her parents was an inability on the part of the family to get along with one another, rather than a desire to attend school in that district at no cost. The student was under the age of eighteen and had established a legal residence separate from her parents.

Mathias v. Richland Sch. Dist., 592 A.2d 811 (Pa. Commw. Ct. 1991). The nondisabled child resided with her guardian mother, but wanted to attend school in her father's district of residence. The court ruled that the child was eligible only for free public schooling from the guardian's district of residence.

Catlin *ex rel.* Catlin v. Sobol, 532 N.Y.S.2d 1006 (Sup. Ct. 1988), *aff'd*, 553 N.Y.S.2d 501 (App. Div. 1990), *rev'd*, 569 N.Y.S.2d 353 (Ct. App. 1991). The court determined that under state code, the "actual and only residence" of a Down's Syndrome seventeen-year-old child remained with the parents, notwithstanding the fact that the child never physically resided with his family. At two weeks of age, the child was placed in a "family home at board" financed by his parents, while the parents' school district of residence paid his educational expenses. When the family moved from the state, the school district within which the child resided was ruled to have no obligation to provide tuition-free schooling to the child.

Sonya C. v. Arizona Sch. for the Deaf and Blind, 743 F. Supp. 700 (D. Ariz. 1990). The hearing impaired plaintiff was born in Yuma, Arizona to Mexican citizens who resided in Puerto Penasco, Mexico. At age twelve, she was sent to live with long-time family friends in Ajo, Arizona, who later became her guardians. The court held that the plaintiff was entitled to tuition-free special education services.

Catlin v. Ambach, 644 F. Supp. 161 (N.D.N.Y. 1986), *vacated and remanded*, 820 F.2d 588 (2d Cir. 1987). New York Education Law stated that children cared for in either free family homes or family homes at board, when the homes were the actual and only residence and when the children were not supported or maintained at the expense of a social services district or a state department or agency, were residents of the school district in which the family home was located. In determining "residential status," however, the state Commissioner maintained that there was a "presumption" that a child's residence was that of the natural parents, but that parents could "overcome" that presumption by demonstrating that they neither exercised control over, nor were financially responsible for, the child. The district court entered summary judgment for the parents in their efforts to acquire a free public education for their child. However, the appeals court vacated the case, finding that state law was unclear and that its resolution could avoid the constitutional issue.

A.C.B. *ex rel.* A. Pearlman v. Denver Dep't of Social Servs., 725 P.2d 94 (Colo. Ct. App. 1986). The court confirmed that the district of residence, and not the Department of Social Services which placed a child, had financial responsibility for the educational needs of a child with learning disabilities who was in foster care.

City of Boston v. Board of Educ., 467 N.E.2d 1318 (Mass. 1984). The city in which the disabled student resided, and not the town in which he attended school, was responsible for the cost of tuition.

Pires v. Pennsylvania Dep't of Educ., 467 A.2d 79 (Pa. Commw. Ct. 1983). Where parents unilaterally placed their disabled child in an out of county private school, the district of residence, and not the district in which the private school was located, was required to pay tuition. The court found that neither the district nor the intermediate unit had fulfilled its responsibility to provide the plaintiff with an appropriate program, thereby justifying the unilateral move by the parents.

Board of Educ. of Fairfield v. Connecticut State Dep't of Educ., 466 A.2d 343 (Conn. Super. Ct. 1983). In this case, foster parents were named to allow a child to receive residential services.

In re **Bryan L.**, 462 A.2d 108 (N.H. 1983). Where the parents of an institutionalized child moved to a new school district, the court ruled that the new district was responsible for the cost of the child's placement.

Nelson v. Tuscarora Intermediate Unit No. 11, 426 A.2d 1234 (Pa. Commw. Ct. 1981), *aff'd*, 457 A.2d 1260 (Pa. 1983). A private residential facility desired reimbursement for the educational costs of a student whose parents resided out of state. The court found that the state in which the facility was located had no obligation to reimburse expenses for an out-of-state child.

In re **Gary B.**, 455 A.2d 929 (N.H. 1983). The court found that the school district with financial responsibility for the child's education was that of the foster parents who wished to adopt the child and with whom the child resided for more than one year prior to moving to an institution.

Board of Educ. v. School Comm. of Amesbury, 452 N.E.2d 302 (Mass. App. Ct. 1983). There was found to be no legal foundation for assigning the school committee in Amesbury, Massachusetts the responsibility for paying for the special needs of a mildly retarded, blind, twenty-one year old child, notwithstanding the fact that this was the last known district of residence of the child's parents.

Connelly *ex rel.* **Connelly v. Gibbs**, 445 N.E.2d 477 (Ill. App. Ct. 1983). The court found that a family which purchased a condominium in Skokie had done so with the intention of receiving free instruction for their hearing-impaired son from the Niles Township educational program. The other children in the family continued to attend the Chicago schools. As a result, the Chicago district was found to be the "true" family residence.

Kerr Center Parents Ass'n v. Charles, 572 F. Supp. 448 (D. Or. 1983). This case dealt with the disagreement over whether the student's home district, the district in which the residential facility was located, or the state should pay for a residential placement. The court found that the state must provide supplemental funds to make the EHCA placements possible.

Rabinowitz v. New Jersey State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982). Where the child's placement was not for the purposes of obtaining tuition free education, the New Jersey court ordered a resident school district to pay tuition for a child who had resided with foster parents since the age of two months. The issue of whether New Jersey could retain reimbursement from New York, where the child's natural parents resided, was not before the court.

In re **Juvenile Case No. 1089**, 398 A.2d 65 (N.H. 1979). The court found that the child's placement in a foster home was not purely for services from that district, but for "the loving and caring environment of the foster home." The district was responsible for tuition to the private institution in which the child received care.

William C. v. Board of Educ. of Chicago, 390 N.E.2d 479 (Ill. App. Ct. 1979). Where no programs were available within the district, the school board was responsible for tuition at a residential program outside the district.

School Dist. No 153, Cook County v. School Dist. No. 154 1/2, Cook County, 370 N.E.2d 22 (Ill. App. Ct. 1977). The court found that the district of residence for the purposes of tuition payment to an institution for the retarded was that where the mother resided. An Illinois law specifying that the residence of an institutionalized child is that of the institution was found to refer to foster homes, children's homes, or state agencies where custody and control was relinquished by the parents.

Age

Association for Retarded Citizens of N.D. v. Olson, 561 F. Supp. 473 (D.N.D. 1982), *modified*, 713 F.2d 1384 (8th Cir. 1983). The court found that the EHCA required educational services to all mentally retarded citizens aged six to twenty-one inclusive, including those citizens who resided in state institutions. Attorney fees of over $455,000 were also awarded.

Green v. Johnson, 513 F. Supp. 965 (D. Mass. 1981). The court determined that incarcerated juveniles had a right to receive EHCA services through age twenty-one.

Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pa., 343 F. Supp. 279 (E.D. Pa. 1972). The court held that once a state takes on the responsibility of education, it must be provided to all children of eligible age.

Qualifying as Handicapped & Otherwise Qualified under the Rehabilitation Act (RA)

Pandazides v. Virginia Bd. of Educ., 752 F. Supp. 696 (E.D. Va. 1990), *rev'd and remanded*, 946 F.2d 345 (4th Cir. 1991), *on remand*, 804 F. Supp. 794 (E.D. Va. 1992). The appeals court determined that issues of material fact existed to preclude summary judgment in the case of a teacher with learning disabilities. Finding that there must be a determination whether the teacher was "otherwise qualified," which included a judgment of whether the posted job requirements were the actual requirements of the position, the court also specified that moderate accommodations that might allow the teacher to remain in the position must be explored. On remand, the district court held that the teacher was not otherwise qualified because she failed the NTE examination, which was found to measure essential functions of the job.

Doherty v. Southern College of Optometry, 659 F. Supp. 662 (W.D. Tenn. 1987), *aff'd in part, rev'd in part*, 862 F.2d 570 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 53 (1989). A student who suffered from retinitis pigmentosa which resulted in deficient motor skills was unable to meet the proficiency requirements at the college of optometry and filed suit under section 504. The court found that he was not otherwise qualified.

Anderson v. University of Wis., 665 F. Supp. 1372 (W.D. Wis. 1987), *aff'd*, 841 F.2d 737 (7th Cir. 1988). A black student failed to prove that his denial to law school was based on discrimination under the Rehabilitation Act resulting from his alcoholism.

***In re* Stober**, 524 A.2d 535 (Pa. Commw. Ct. 1987), *reh'g granted*, 531 A.2d 594 (Pa. Commw. Ct. 1987). A school bus driver whose license was revoked due to reported heart trouble requested relief under the Rehabilitation Act. The court remanded the case to determine whether some type of medical screening prior to dismissal of employees such as this would represent moderate accommodation.

Schuler v. University of Minn., 788 F.2d 510 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 932 (1987). A graduate student's alleged emotional disabilities were insufficient to support a claim of discrimination under section 504 of the Rehabilitation Act.

Wolff v. South Colonie Cent. Sch. Dist., 534 F. Supp. 758 (N.D.N.Y. 1982). A physically handicapped student did not have a section 504 right to participate in a school sponsored trip to Spain.

New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391 (D.N.M. 1980), *rev'd and remanded*, 678 F.2d 847 (10th Cir. 1982). The lower court found that section 504 of the Rehabilitation Act provided a private right of action for parents where the state did not receive EHA funds. On appeal, the case was remanded for a determination of whether failure to diagnose and accommodate handicaps under the Act constituted discrimination.

Southeastern Community College v. Davis, 442 U.S. 397 (1979). A student with a severe hearing impairment was denied admission to a state nursing program. The court held that the school could require reasonable qualification standards, and that to reduce the requirements because of the plaintiff's handicap was not required. With moderate accommodation, the plaintiff was required to be qualified in spite of her handicapping condition.

Qualifying as a Person with a Disability under the IDEA

Conrad Weiser Area Sch. Dist. v. Department of Educ., 603 A.2d 701 (Commw. Ct. Pa. 1992). A "mentally gifted" student was ruled eligible for special education due to a specific learning disability in the area of written expression.

A.E. *ex rel.* Evans v. Independent Sch. Dist. No. 25, of Adair County, Ok., 936 F.2d 472 (10th Cir. 1991). The student was not eligible for services under the EHA as "seriously emotionally disturbed," even though she was socially maladjusted, disruptive in class, and had attempted suicide.

Doe *ex rel.* Doe v. Board of Educ. of Conn., 753 F. Supp. 65 (D. Conn. 1990). A depressed, violent student who performed well in school and demonstrated no academic underachievement did not qualify as severely emotionally disturbed (SED) under IDEA.

Centennial Sch. Dist. v. Commonwealth Dep't of Educ., 503 A.2d 1090 (Pa. Commw. Ct. 1986), *aff'd*, 539 A.2d 785 (Pa. 1988). The court found that Pennsylvania state law required the district to provide IEPs for gifted students, rather than merely providing generalized enrichment activities.

Monahan v. School Dist. No. 1 of Douglas County, 425 N.W.2d 624 (Neb. 1988). The court found that the state statute which required that disabled students be provided an education "to age twenty-one" did not require programming through the student's twenty-second birthday.

Natrona County Sch. Dist. No. 1 v. Ryan, 764 P.2d 1019 (Wyo. 1988). The State Board of Education expanded school boards' obligations by requiring that education for disabled students be provided until age twenty-two.

Parents of Child, Code No. 870901W v. Coker, 676 F. Supp. 1072 (E.D. Okla. 1987). The EHA, which required appropriate educational services for an emotionally disturbed child who was HIV positive, was ruled to pre-empt state law regarding contagious diseases.

Blazejewski *ex rel.* Blazejewski v. Board of Educ. of Allegany Cent. Sch. Dist., 560 F. Supp. 701 (W.D.N.Y. 1983). School performance was found to be one of several factors appropriately considered when determining a child's need for special education services.

Schoenfeld v. Ambach, 451 N.Y.S.2d 859 (App. Div. 1982). The court affirmed a hearing officer decision that the child, who had previously been diagnosed with minimal brain dysfunction, was not disabled under the law for the year in question.

Johnpoll v. Elias, 513 F. Supp. 430 (E.D.N.Y. 1980). The father of a gifted child brought suit alleging that his son did not receive a "decent education," and requesting placement at a high school other than the one to which he would normally have been assigned. The court found no proof that he was eligible for EHA services as seriously and emotionally disturbed, and denied the request.

Martin Luther King Elementary Sch. Children in Green Road Housing Project v. Michigan Bd. of Educ., 451 F. Supp. 1324 (E.D. Mich. 1978). Students with mild disabilities who were not disabled under the law complained that students with learning disabilities received preferential treatment in violation of the equal protection clause. The court found that the program, as it was enforced, had a rational relationship to a legitimate end even though it deprived children in certain cultural groups from receiving comparable materials and programs.

Disease as a Handicap/Disability

Jeffrey S. *ex rel.* Ernest S. v. State Board of Educ. of Ga., 896 F.2d 507 (11th Cir. 1990). The mildly to moderately retarded plaintiff was in the final stage of renal disease and required an ileostomy bag and dialysis twice weekly. After the school district was informed that he also was a hepatitis B carrier, he was placed on homebound instruction until he was no longer contagious. The hearing officer recommended an injunction allowing the plaintiff to attend school, and this was upheld at the district court level. On appeal, the court found that the district court failed to provide a *de novo* review. The injunction was vacated and the case was remanded for full trial.

Kohl *ex rel.* Kohl v. Woodhaven Learning Center, 672 F. Supp. 1226 (W.D. Miss. 1987), *rev'd and remanded*, 865 F.2d 930 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 239 (1989). The court upheld an earlier finding that the plaintiff was excluded solely for reason of his handicap in violation of section 504. However, immunization only of all direct service staff, as proposed by the lower court, posed an unreasonable risk to staff members who would not be immunized under this limited plan, and as such was disallowed by the court. The case was reversed and remanded.

Martinez v. School Bd. of Hillsborough County, Fla., 692 F. Supp. 1293 (M.D. Fla. 1988), *vacated and remanded*, 861 F.2d 1502 (11th Cir. 1988), *on remand*, 711 F. Supp. 1066 (M.D. Fla. 1989). The district court previously had ordered that a child with AIDS be taught in a separate room to be constructed in the classroom. The Eleventh Circuit Court of Appeals vacated and remanded. On remand, the court held that the child was otherwise qualified to attend a classroom for trainable mentally handicapped students and that the risk of transmission was not significant.

Robertson v. Granite City Comm. Sch. Dist. No. 9, 684 F. Supp. 1002 (S.D. Ill. 1988). Plaintiff sought an injunction against the board's decision to place a child with AIDS-related complex in a separate modular classroom. The court reasoned that although the child did not qualify as handicapped under the EHA, he was handicapped under the RA. Furthermore, the court supported the request for a temporary restraining order and a preliminary injunction.

Arline v. School Bd. of Nassau County, Fla., 772 F.2d 759 (11th Cir. 1985), *aff'd*, 480 U.S. 273 (1987), *on remand*, 692 F. Supp. 1286 (M.D. Fla. 1988). A teacher with thirteen years of experience had her contract terminated following her third relapse of tuberculosis. The teacher contended that her handicap created no barrier to continued employment because the risk she would infect others was minimal. In the alternative, she claimed that the district should have offered a reasonable accommodation by assigning her to a position working with persons "less susceptible" to the disease. In a seven-to-two decision, the Supreme Court concluded that the plaintiff was a handicapped person under the RA and remanded the case to determine whether the risk of infection precluded the plaintiff from being "otherwise qualified" for her job. The Court reasoned that an otherwise qualified handicapped person is one who is able to meet all program requirements in spite of the handicap. The Court noted that the nature of the disease, the expected duration, the severity, and the probability of transmission must be considered in determining whether the individual is otherwise qualified. On remand, the district court held that the teacher was otherwise qualified when she was discharged and was entitled to reinstatement and back pay.

Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440 (N.D. Ill. 1988). The court provided a preliminary injunction to a child with AIDS to allow the child to return to regular classes as a full-time student.

Phipps v. Saddleback Valley Unified Sch. Dist., 251 Cal. Rptr. 720 (Ct. App. 1988). A student (hemophiliac) who tested positive for AIDS was denied admission to a public school. The plaintiff initially was told that the district was in the process of formulating a policy and that she could receive services in the home. The appeals court upheld the issuance of a permanent injunction ordering the school district to permit the student to attend a regular school, subject to a periodic re-evaluation of her medical condition.

Parents of Child, Code No. 870901W v. Coker, 676 F. Supp. 1072 (E.D. Okla. 1987). A child who tested positive for the HIV virus and had an emotional disorder was denied placement in school. The court supported the placement of the child under the EHA.

Martinez v. School Bd. of Hillsborough County, Fla., 675 F. Supp. 1574 (M.D. Fla. 1987). The court denied a motion for preliminary injunction which would have allowed a child with AIDS related complex to attend a class for trainable mentally handicapped children, citing limited medical knowledge and legal precedent to allow such an injunction.

Kohl *ex rel.* Kohl v. Woodhaven Learning Center, 672 F. Supp. 1221 (W.D. Mo. 1987). A student with hepatitis B was denied admission to a vocational facility. The court ruled that the plaintiff was handicapped under section 504. However, material fact as to whether his status as a carrier of hepatitis B was the sole reason he was denied admission precluded summary judgment. Later, in ***Kohl ex rel. Kohl v. Woodhaven Learning Center***, 676 F. Supp. 945 (W.D. Mo. 1987), the court denied a motion to reconsider.

Doe v. Belleville Pub. Sch. Dist. No. 118, 672 F. Supp. 342 (S.D. Ill. 1987). A student with AIDS brought this action because he had been excluded from classes. The court held that the EHA did not apply to the student because he was not handicapped as defined in the Act. However, the court did not uphold the motion by the defendant to dismiss the action because exhaustion of remedies is not required under section 504 or where exhaustion would be futile.

Ray v. School Dist. of Desoto County, 666 F. Supp. 1524 (M.D. Fla. 1987). The parents of three children with human immuno-deficiency virus (HIV) and carriers of AIDS antibodies were ruled to be entitled to a preliminary injunction admitting their children to normal and regular integrated classrooms, subject to guidelines adopted by the court, until it could be established that the children posed a real threat to the school population.

Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987). Parents of a child infected with AIDS brought this action to require the district to allow the child to attend regular kindergarten classes. The court ruled that the child was handicapped under the RA and that he was otherwise qualified to attend regular kindergarten classes, in the absence of evidence that he posed a significant risk to others. The school psychologist predicted that the child was likely to engage in aggressive behavior, although he was not predicted to bite, as he previously had done.

Board of Educ. of City of Plainfield v. Cooperman, 507 A.2d 253 (N.J. Super. Ct. App. Div. 1986), *modified and aff'd*, 523 A.2d 655 (N.J. 1987). State guidelines for the admission to school of children with AIDS antibodies were challenged by two local boards of education. The guidelines required the admission of such children unless the following exceptional conditions were evident: (1) the student was not toilet trained or was incontinent, or otherwise was unable to control drooling; and (2) the student was unusually physically aggressive, with a documented history of biting or harming others. The state supreme court held that the commissioner could override the power of boards of education to exclude students from public schools due to health reasons, and that state regulations for exclusion from schools of HIV infected children were valid.

District 27 Community Sch. Bd. v. Board of Educ. of City of New York, 502 N.Y.S.2d 325 (Sup. Ct. 1986). An effort was made to acquire a temporary restraining order prohibiting education officials and the health commissioner from admitting children with AIDS to public schools which were not specifically designed to accommodate their needs. The state trial court refused to issue the injunction to prohibit the preferred placement and argued that to automatically exclude children with AIDS from public schools would violate their rights under both the RA and the Fourteenth Amendment. Furthermore, the court concluded that a person with AIDS clearly is physically impaired, as defined under the RA, given that the virus destroys certain lymphocytes, and that such a person also may be disabled under the EHA if his condition deteriorates to the point of needing special education and related services.

Kling v. County of Los Angeles, 769 F.2d 532 (9th Cir. 1985), *rev'd*, 474 U.S. 936 (1985) (mem.). In this case, an applicant for admission to a nursing school filed suit alleging that she had been discriminated against on the basis of her handicap—Crohn's disease. The circuit court ruled that the plaintiff was an otherwise qualified handicapped individual within the meaning of the RA and was denied admission solely because of her handicap. The physician assumed that because of her disease she would be unable to complete the school's program, but did not evaluate her on an individual basis. The plaintiff had been admitted to the program until it was learned that she had failed her physical examination. Damages were ruled to be appropriate, given that injunctive relief would not remedy the harm. However, the case then was appealed to the Supreme Court where the circuit court decision was reversed (seven-to-two) without comment from the majority.

Community High Sch. Dist. 155 v. Denz, 463 N.E.2d 998 (Ill. App. Ct. 1984). The plaintiff was a trainable mentally handicapped child with Down's Syndrome who also was a carrier of hepatitis B. She requested a change of placement from a homebound program to the local special education school. The district denied the request and argued that she posed too great a risk to others. The hearing officer disagreed and ordered the preferred placement. An aide was to be assigned to guard against transmission. On appeal, the state superintendent upheld the hearing officer, as did the state trial and appeals courts. Three doctors testified as to the difficulty of transmitting the disease and as to the advantage of proper hygiene.

New York State Ass'n for Retarded Children, Inc. v. Carey, 612 F.2d 644 (2d Cir. 1979). Mentally retarded children with hepatitis B were excluded from school by the board, although the Department of Health recommended that they be isolated within their respective schools. An injunction was issued to prevent the exclusion. As a result, forty-eight handicapped carriers were admitted, but most were assigned to new classes, teachers, or schools. No effort was made to isolate carriers of the B antigen who were not mentally retarded. The court ruled that a section 504 violation existed, and concluded that the board had failed to show that the children represented a real threat to others.

Due Process Procedures

Evaluation, Development of an IEP, Review & Reevaluation

Edwards-White v. District of Columbia, 785 F. Supp. 1022 (D.D.C. 1992). The school district failed to review or revise a child's IEP, notwithstanding the parents' request for a due process hearing. Additionally, the court held that the retrospective presumption of appropriateness of the child's placement was appropriate, given the district's procedural violations.

Board of Educ., Commack Union Free Sch. Dist. v. Fernandez, 590 N.Y.S.2d 310 (App. Div. 1992). In this case, the plaintiffs were seeking reimbursement for costs incurred when they acquired a second evaluation of their child. The hearing officer had ruled for the district and concluded that reimbursement was not required. The parents appealed that decision to the State Review Officer (SRO), who reversed claiming that the appropriateness of an evaluation depended on both the test results and their interpretation. The state appeals court reversed the lower court decision supporting the SRO and ruled that the SRO did not have jurisdiction and that the appeal should have been directed to the Commissioner. (The confusion regarding the state appeals process was due to a change in state policy shifting responsibilities from the Commissioner to the SRO by a specified date. This issue had been appealed just prior to the transition period and should have been reviewed by the Commissioner.)

Big Beaver Falls Area Sch. Dist. v. Jackson *ex rel.* Nesmith, 615 A.2d 910 (Pa. Commw. Ct. 1992). The parent was denied her right to participate in the IEP process when her signature was requested on a completed IEP.

Spielberg *ex rel.* Spielberg v. Henrico County Pub. Schs., 853 F.2d 256 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 1131 (1989). The court found a violation of the EHA where the school district sought to move a handicapped child who had been placed at a residential facility to the local public school before developing an IEP. Failure to follow the appropriate procedures was equated to failure to provide a FAPE. The court ordered that the child be allowed to remain at the residential facility at district expense.

Lenhoff *ex rel.* Lenhoff v. Farmington Pub. Schs., 680 F. Supp. 921 (E.D. Mich. 1988). The school district had no obligation to leave the state to evaluate a child after the parents unilaterally placed their child in an out-of-state facility.

Seals v. Loftis, 614 F. Supp. 302 (E.D. Tenn. 1985). A child with a seizure disorder, vision difficulty, and a learning disability was referred for neurological and psychological evaluation by a pediatrician. Services from the pediatrician had been requested by the multidisciplinary team evaluating the child for EHCA services. The court ruled that since the school had assisted in the request for these evaluations, the parents could not be required to use their private insurance to pay related costs.

Healey *ex rel.* Healey v. Ambach, 481 N.Y.S.2d 809 (App. Div. 1984). The court found that the school district must consider the child's special needs when determining an appropriate evaluation. The child in this case had an aversion to test taking and would perform her best if tested in her home environment.

Carroll v. Capalbo, 563 F. Supp. 1053 (D.R.I. 1983). The court held that parental consent is not required for a reevaluation.

Christopher T. v. San Francisco Unified Sch. Dist., 553 F. Supp. 1107 (N.D. Cal. 1982). The court accused the school district of delaying residential placement by requiring additional testing of a student whose evaluations were already "voluminous."

Isgur v. School Comm. of Newton, 400 N.E.2d 1292 (Mass. App. Ct. 1980). The parents of a child who had received an "intermediate core" evaluation rather than the "full core" evaluation required by law, rejected the proposed in-school placement and requested reimbursement for tuition expenses they incurred after attaining private placement. The court found that the "full core" evaluation would have provided similar recommendations and did not require the reimbursement where good faith on the part of the district was evident.

Frankel v. Commissioner of Educ., 480 F. Supp. 1156 (S.D.N.Y. 1979). Where the district failed to timely and appropriately evaluate a handicapped boy, the parents did not moot their claim by transferring their child to a private residential facility.

Access to & Production of Records (written, video, audio)

Gardner v. School Bd. Caddo Parish, 958 F.2d 108 (5th Cir. 1992). The lower court had ruled that exhaustion was futile and that the parents had the right to tape record parent-teacher conferences. On appeal, however, the court held that plaintiff failed to carry the burden of proving that exhaustion would have been futile.

Militello v. Board of Educ. of City of Union City, 803 F. Supp. 974 (D.N.J. 1992). The court held that a mother of a special need child was entitled to a written transcript of a complex state administrative hearing, notwithstanding the fact that the cost was estimated to be $4,700 and that an electronic record of the hearing had already been provided.

Sean R. *ex rel.* Dwight R. v. Board of Educ. of Town of Woodbridge, 794 F. Supp. 467 (D. Conn. 1992). Plaintiffs did not alledge defamation in this case, but rather argued that there had been an invasion of privacy when an institution made public information about them and their special need child. The court held that their claim supported a cause of action under IDEA, the Fourteenth Amendment, and section 1983 to redress the violation.

Aufox v. Board of Educ. of Township High Sch. Dist. No. 113, 588 N.E.2d 316 (Ill. App. Ct. 1992). Plaintiffs alleged a violation of the state School Student Records Act when their child's records were made available to third parties without their written permission. The court upheld the district's action in allowing its attorney to review the child's record prior to court proceedings and in permitting access to the court clerk during the hearings. The court reasoned that the parent's conduct had resulted in a waiver of their right to provide written consent.

Caroline T. v. Hudson Sch. Dist., 915 F.2d 752 (1st Cir. 1990). The court held that the district may have a court reporter present at a hearing and that such an act is not tantamount to having an open hearing.

E.H. v. Tirozzi, 735 F. Supp. 53 (D. Conn. 1990). Danish parents were denied the right to tape-record planning and placement team meetings, allegedly desired because the mother had trouble understanding written and spoken English. The court held that the parents were entitled to tape-record the meetings.

V.W. v. Favolise, 131 F.R.D. 654 (D. Conn. 1990). The court ruled that parents of a handicapped child may tape-record parent-teacher meetings.

Bowie v. Evanston Community Consol. Sch. Dist. No. 65, 538 N.E.2d 557 (Ill. 1989). Parents sought disclosure of standardized test scores and a list of educational programs available in selected schools. The state high court held that the school district was obligated to disclose masked and scrambled records of achievement test scores under the state Freedom of Information Act.

Klein Indep. Sch. Dist. v. Mattox, 830 F.2d 576 (5th Cir. 1987). The court held that FERPA did not apply to a teacher's employment file, including prior college transcripts.

Edward B. v. Paul, 814 F.2d 52 (1st Cir. 1987). The district complied with due process by providing the parents of a handicapped student with an electronic transcript of the administrative hearing, notwithstanding their request for a free written transcript.

Oregon County R-IV Sch. Dist. v. LeMon, 739 S.W.2d 553 (Mo. Ct. App. 1987). The court held that the district disclosure of names, addresses, and telephone numbers was not barred by FERPA.

Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21 (2d Cir. 1986). Father brought suit because he had been denied access to his children's educational records. The court observed that FERPA itself does not give rise to a private cause of action, but noted that a FERPA violation could be a basis for a related suit under section 1983, reasoning that FERPA did not expressly preclude such suits. Accordingly, the case was remanded to determine the amount of compensatory damages.

Western Servs., Inc. v. Sargent Sch. Dist. No. RE-33J, 719 P.2d 355 (Colo. Ct. App. 1986). A nonprofit corporation filed an action to obtain basic skills test scores by grade level, coded to indicate ethnic background. The court held that the records should be disclosed after omitting the names of the test takers, scrambling the order of the scores, and coding Hispanic surnamed individuals to show ethnic origin.

Board of Educ. of City of New York v. Regan, 500 N.Y.S.2d 978 (Sup. Ct. 1986). The court held that the state comptroller was not entitled to a list of students because such information was confidential under FERPA.

Daniel B. v. Wisconsin Dep't of Pub. Instruction, 581 F. Supp. 585 (E.D. Wis. 1984). The court held that FERPA does not provide private litigants with a damage remedy in federal court.

Price v. Young, 580 F. Supp. 1 (E.D. Ark. 1983). The court held that there was no private right of action under FERPA.

Krauss v. Nassau Community College, 469 N.Y.S.2d 553 (Sup. Ct. 1983). The court held for the college which had denied the petitioner a list of the names and addresses of all students. The petitioner failed to show that the request was not for commercial or fund-raising purposes.

Hathaway v. Joint Sch. Dist. No. 1, 329 N.W.2d 217 (Wash. Ct. App. 1982). Effort was made to compel the school board to permit the plaintiff access to a computer-generated list of names and addresses of parents with pupils enrolled in the district. The court held that the computer list was not a confidential pupil record within the meaning of state statute.

Page v. Rotterdam-Mohonasen Cent. Sch. Dist., 441 N.Y.S.2d 323 (Sup. Ct. 1981). The court held that where a separation agreement does not restrict a parent from viewing his child's records, FERPA requires a district to make records available, even if the mother has signed a statement indicating that she did not want the father to have access.

Sauerhof v. City of New York, 438 N.Y.S.2d 982 (Sup. Ct. 1981). The court held that a hearing to challenge the release of information must be available prior to the release of a court order, and not just prior to the release of records. This is true when small numbers of children are involved. Furthermore, a summons is not a sufficient notice.

Arkansas Gazette Co. v. Southern State College, 620 S.W.2d 258 (Ark. 1981). The court held that records maintained by the Arkansas Intercollegiate Athletic Conference as to the amount of money member institutions dispersed to student athletes were not "educational records" required to be disclosed to the public under FERPA. Furthermore, the AIAC was held not to be an educational agency subject to the requirements of the Act.

Kryston v. Board of Educ., East Ramapo Cent. Sch. Dist., 430 N.Y.S.2d 688 (App. Div. 1980). The court held that disclosure of certain test scores in a scrambled order and with names deleted would protect the privacy of students.

Spas v. Wharton, 431 N.Y.S.2d 638 (Sup. Ct. 1980). The court held that a university may refuse to issue a transcript to a student who had not paid his fees, even if the debt was barred from collection by the statute of limitations. Such a practice did not violate FERPA.

Kestenbaum v. Michigan State Univ., 294 N.W.2d 228 (Mich. Ct. App. 1980). The court held that a notice in the student handbook was sufficient to justify distribution of directory information. Appeal at 327 N.W.2d 783 (Mich. 1982) was based on the state's Freedom of Information Act and not FERPA. The FOIA provides for freedom in information, not freedom to acquire valuable technological data developed at public expense.

Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979). The court held that FERPA did not affect the distribution of information that is derived from a source independent of school records. The school had censored an article in the school newspaper, the content of which was not derived from school records.

Board of Educ., Island Trees Union Free Sch. Dist. v. Butcher, 402 N.Y.S.2d 627 (App. Div. 1978). The court held that the school board representative would be required to reproduce the entire records of a teacher's students, after obliterating all identifying data, for use in a disciplinary hearing against the teacher.

Girardier v. Webster College, 563 F.2d 1267 (8th Cir. 1977). The court held that a college does not have to release transcripts of students who have not paid their fees, notwithstanding a bankruptcy claim. Also, no private right of action is available under FERPA.

Rios v. Read, 73 F.R.D. 589 (E.D.N.Y. 1977). The court held that a school is not subject to sanctions because it discloses personally identifiable information if it does so in compliance with a judicial order. The party seeking disclosure is required to demonstrate a genuine need for the information that outweighs the privacy interest of the plaintiffs. Where large numbers of students are involved, it may be enough for a district to publish the notice in a newspaper. Notice must be made prior to disclosure.

Student Bar Ass'n Bd. of Governors v. Byrd, 239 N.E.2d 415 (Sup. Ct. N.Y. 1977). The court held that the Buckley Amendment did not forbid disclosure of information concerning a student and, therefore, did not forbid opening to the public a faculty meeting at which such matters were discussed. Although such open meetings may result in the termination of federal aid, the state Open Meeting Law did not require the meetings of the law school faculty to be open to the public.

Reeg v. Fetzer, 78 F.R.D. 34 (W.D. Okla. 1976). The court held that FERPA does not prohibit the release of information but, rather, sets up guidelines for such release and specifically provides for release of information pursuant to judicial order.

Mattie T. v. Johnston, 74 F.R.D. 498 (N.D. Miss. 1976). The court held that FERPA does not bar disclosure of subpoenaed documents that were not identifiable by student. Notice must be provided by the educational agency and not the party who subpoenaed the documents.

Notification & Consent Requirements

Smith v. Squillacote, 800 F. Supp. 993 (D.D.C. 1992). In this action for summary judgment, the district court ruled for the school district and concluded that the notice of a proposed change of placement received by the parents was adequate under IDEA. The notice was not required to explain reasons for the "multiple handicapped" classification or why the child could not be placed in a particular private school.

Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990). The court held that the state must comply with EHA procedural safeguards, including the notification of the parents prior to terminating a student's educational placement on the basis of the mentally retarded student's consent. As a result, the student was ruled to be entitled to compensatory education based on the state's gross violations of EHA regulations.

Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). The court upheld the district proposed placement, notwithstanding claims by the parent that adequate notice had not been provided.

Abney *ex rel.* Kantor v. District of Columbia, 849 F.2d 1491 (D.C. Cir. 1988). The school district was, at the minimum, responsible for notifying the surrogate parent once it determined that it could no longer safely transport a handicapped child due to severe lesions on his feet. However, the surrogate was required to exhaust administrative remedies to receive relief.

Failure to Provide Due Process

Mrs. W. v. Tirozzi, 832 F.2d 748 (2d Cir. 1987), *on remand*, 706 F. Supp. 164 (D. Conn. 1989). A district court held that the parents of a handicapped child stated a section 1983 claim for a violation of the EHA due to the state's failure to make legitimate attempts to resolve the parent's complaint and to fully implement and conduct informal complaint resolution procedures.

Board of Educ. of Cabell v. Dienelt, 843 F.2d 813 (4th Cir. 1988). The school district failed to meet EHA procedural safeguards and in doing so failed to provide a FAPE.

Association for Retarded Citizens of Ala. Inc. v. Teague, 830 F.2d 158 (11th Cir. 1987). The court found no support for the contention that state procedures for administrative review denied the plaintiff's due process. The court returned the case to administrative review.

***In re* J.D.**, 510 So. 2d 623 (Fla. Dist. Ct. App. 1987). A surrogate parent was appointed after the natural parent continually refused to allow evaluation and placement of a child the school alleged had special needs. The natural parent sought review in court, claiming a continued right to due process. The appeals court found that the lower court did not have the authority to appoint a guardian only for educational purposes, and that "a parent of a dependent child retains the right to initiate, or participate in, a due process hearing."

Manecke v. School Bd. of Pinellas County, Fla., 553 F. Supp. 787 (M.D. Fla. 1982), *aff'd in part, rev'd in part*, 762 F.2d 912 (11th Cir. 1985), *reh'g denied*, 770 F.2d 1084 (11th Cir. 1985). Basing its decision on ***Smith v. Robinson***, the court dismissed a request for damages under section 504 for failure to provide services under the EHCA. However, regarding a request for tuition reimbursement under section 1983, the court found that "where . . . the local educational agency deprives a handicapped child of due process by effectively denying that child access to the heart of the EHA administrative machinery, the impartial due process hearing, an action may be brought under 1983." The case was remanded to determine whether due process violations had occurred.

Patsel v. District of Columbia Bd. of Educ., 522 F. Supp. 535 (D.D.C. 1981). Where parents were denied a hearing on a change of placement because they failed to complete the appropriate form, a hearing on the contested placement was ordered to be held within five days.

Eberle v. Board of Pub. Educ. of the Sch. Dist. of Pittsburgh, Pa., 444 F. Supp. 41 (D. Pa. 1977). The EHCA procedural safeguards were held to take effect October 1, 1977 when the state accepted EHA funds. A hearing impaired boy who was transferred to a new program without due process prior to that date had no right to retroactive relief.

Smith v. Mundy, 432 F. Supp. 516 (E.D. Wis. 1977). Where no federal title XX funds were involved, the court ruled that neither federal regulations nor the due process clause required notice and a hearing before the termination of day treatment services for handicapped children.

Lowery v. Brockport Cent. Sch. Dist., 388 N.Y.S.2d 82 (Sup. Ct. 1976). The court found that the parents were entitled to attend committee hearings regarding the classification of their child. However, the reassignment of the child to a specific school was the district's responsibility and did not require parental notice or a hearing.

Change of Placement

Cronin v. Board of Educ. of East Ramapo Cent. Sch. Dist., 689 F. Supp. 197 (S.D.N.Y. 1988). The court granted an injunction that prevented the school district from graduating a student who was handicapped as defined in the EHA. The court ruled that graduation was a change of placement which triggered the stay-put provision and all procedural safeguards outlined in the Act.

Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577 (D.C. Cir. 1984). The discharge of a profoundly handicapped child from a private hospital did not constitute a change of placement requiring due process since the hospital was not a state actor under EHCA.

Stock v. Massachusetts Hosp. Sch., 467 N.E.2d 448 (Mass. 1984). The court granted compensatory education to a student who graduated from school where the school did not give proper notification that special education services would end at that time. In addition, the parents did not have the opportunity for due process prior to the change in placement.

Cohen v. Board of Educ. of City of New York, 454 N.Y.S.2d 630 (Sup. Ct. 1982). The court ruled that it was not a change of placement when a program for handicapped students was closed resulting in the transfer of students to another program.

Dima v. Macchiarola, 513 F. Supp. 565 (E.D.N.Y. 1981). The district's action in transferring a handicapped child from one private school to another in response to alleged fiscal mismanagement uncovered during an audit, was not seen as a "change of placement" requiring due process.

Ogden v. Kelley, 594 S.W.2d 702 (Tenn. 1980). The school district transferred a handicapped child from an out-of-district to an in-district placement and the parents sought administrative review. The court found that the administrative hearing officers and subsequent courts were subject to the requirements of the Uniform Administrative Procedures Act, and remanded with instructions to follow appropriate procedures.

Exhaustion of Administrative Remedies

Gardner v. School Bd. Caddo Parish, 958 F.2d 108 (5th Cir. 1992). The court held that the plaintiff failed to carry the burden of proof that exhaustion would have been futile.

Norris *ex rel.* Norris v. Board of Educ. of Greenwood Community Sch. Corp., 797 F. Supp. 1452 (S.D. Ind. 1992). The court held that the plaintiffs had failed to exhaust administrative remedies and ordered summary judgment for the defendant.

Moss *ex rel.* Mutakabbir v. Smith, 794 F. Supp. 11 (D.D.C. 1992). The district court held that the plaintiff had failed to exhaust administrative remedies prior to bring this IDEA suit to federal court.

Frutiger v. Hamilton Cent. Sch. Dist., 928 F.2d 68 (2d Cir. 1991). Parental action in exhausting administrative remedies in a dispute over a student's 1989-90 placement did not constitute exhaustion over 1990-91 placement, and therefore the district court's decision to deny an evidentiary hearing was not appealable under 28 USC 1292(a)(1).

Dawson v. Gibson, 575 N.Y.S.2d 517 (App. Div. 1991). Parents were required to exhaust administrative remedies before bringing action to place their son, who suffered from Tourette's Syndrome, in a twelve-month residential facility.

Kerr Center Parents Ass'n v. Charles, 897 F.2d 1463 (9th Cir. 1990). Parents with mentally retarded children residing at Kerr Center brought suit claiming that their children were being denied a FAPE and that their due process rights had been violated. The circuit court held that the Eleventh Amendment did not prohibit an order compelling the state to comply prospectively with the EHA and that the plaintiffs were not required to exhaust administrative remedies under the EHA.

Carey *ex rel.* Carey v. Maine Sch. Admin. Dist. #17, 754 F. Supp. 906 (D. Me. 1990). A student who brought an automatic weapon and ammunition was expelled from school. The court found that the plaintiff failed to exhaust administrative remedies under the EHA, and that the court lacked jurisdiction to review the state tort claims for infliction of emotional distress.

Lawson v. Edwardsburg Pub. Sch., 751 F. Supp. 1257 (W.D. Mich. 1990). Michigan's three year statute of limitations disallowed review of claims decided in 1985 and 1986. Additionally, the plaintiff failed to exhaust administrative remedies for the 1989 claims.

Waterman v. Marquette-Alger Intermediate Sch. Dist., 739 F. Supp. 361 (W.D. Mich. 1990). Parents brought suit claiming excessive and abusive discipline of their handicapped children in violation of the EHA, section 504, and section 1983. On a motion to dismiss or for summary judgment, the court held that monetary damages were not recoverable under the EHA and that plaintiffs had not exhausted their administrative remedies.

Pink *ex rel.* Crider v. Mount Diablo Unified Sch. Dist., 738 F. Supp. 345 (N.D. Cal. 1990). On this motion by plaintiff for a determination of the standard of review, the court held that existing California standards were appropriate under the EHA and that the court could not address remedies for school years which had not been reviewed in administrative proceedings.

Buffolino v. Board of Educ. of Sachem Cent. Sch. Dist. at Holbrook, 729 F. Supp. 240 (E.D.N.Y. 1990). The court ruled that where a claim may be brought under the EHA, but rather was filed under section 1983, section 504, and the Constitution, the plaintiff still must exhaust administrative appeals prior to suit, unless (1) it would prove futile to use existing due process procedures, or (2) adequate relief could not be obtained through such channels. Neither situation existed in the present case.

Doe *ex rel.* Doe v. Smith, 879 F.2d 1340 (6th Cir. 1989). The circuit court held that although the parents of a handicapped child did not waive their rights to seek reimbursement by removing their child from his public placement and enrolling him in a private school, they had failed to exhaust the administrative remedies available to them under the EHA.

Cox v. Jenkins, 878 F.2d 414 (D.C. Cir. 1989). In an appeal of a decision by the district court that a child would be placed in a private school, the circuit court reversed holding that the parents failed to exhaust their administrative remedies, notwithstanding their claim that to do so would have been futile.

Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089 (1st Cir. 1989). The court held that a student who had been disciplined lacked standing because he failed to exhaust state administrative remedies.

Hayes *ex rel.* Hayes v. Unified Sch. Dist. No. 377, 669 F. Supp. 1519 (D. Kan. 1987), *rev'd and remanded*, 877 F.2d 809 (10th Cir. 1989). This case involved the use of time-out rooms during in-school suspensions. The court held that the parents had failed to exhaust administrative remedies.

Harper v. School Admin. Dist. No. 37, 727 F. Supp. 688 (D. Me. 1989). The parents of a handicapped child were denied a temporary restraining order requiring that their child be placed at a rehabilitation facility. The court ruled that they had failed to exhaust administrative remedies.

Browning v. Evans, 700 F. Supp. 978 (S.D. Ind. 1988). Action by a student who questioned the adequacy of his IEP was dismissed for failure to exhaust administrative remedies.

Secor v. Richmond Sch. Joint Dist. No. 2 Lisbon-Pewaukee, 689 F. Supp. 869 (E.D. Wis. 1988). The parents failed to exhaust administrative remedies.

Laura V. v. Providence Sch. Bd., 680 F. Supp. 66 (D.R.I. 1988). The parents were required to exhaust administrative remedies before bringing section 1983 or EHA claims into the courts.

Behavior Research Inst., Inc. v. Ambach, 535 N.Y.S.2d 465 (App. Div. 1988). Parents who sought reimbursement of attorney fees were not required to exhaust administrative remedies where it would have been futile to do so.

G.C. *ex rel.* W.S. v. Coler, 673 F. Supp. 1093 (S.D. Fla. 1987). The court found that, while the parents could file suit to compel the school to provide special education services at a juvenile detention center, they failed to exhaust administrative remedies.

S-1 v. Turlington, 646 F. Supp. 1179 (S.D. Fla. 1986). Black students, who were allegedly misclassified as mentally retarded, were not required to exhaust administrative remedies where this would have been futile.

Woods Schs. v. Commonwealth Dep't of Educ., 514 A.2d 686 (Pa. Commw. Ct. 1986). A private school was required to exhaust administrative remedies in an attempt to obtain reimbursement for tuition and expenses for a child placed there by the local school district. In the best interest of the child, the school could not dismiss the child based on the local district's delinquency in paying costs.

Semel v. Ambach, 505 N.Y.S.2d 466 (App. Div. 1986). Where the parents sought to change their child's placement, the court ruled that they failed to exhaust administrative remedies.

Diamond v. McKenzie, 602 F. Supp. 632 (D.D.C. 1985). Where the school district failed to communicate with parents or justify its decisions, and had not complied with the directives of a hearing officer, the court found that further attempts to resort to the administrative process would have been futile.

Antkowiak *ex rel.* Antkowiak v. Ambach, 621 F. Supp. 975 (W.D.N.Y. 1985). The parents failed to exhaust administrative remedies.

Andre H. v. Ambach, 104 F.R.D. 606 (S.D.N.Y. 1985). The court found it to be futile to exhaust administrative remedies where the adequacy of these remedies was part of the dispute.

Alban v. Board of Educ. of Harford County, 494 A.2d 745 (Md. Ct. Spec. App. 1985). The issue of whether a child was negligently injured by improper placement in a physical education class was not properly before the courts where the parents failed to exhaust administrative remedies.

Robideau v. South Colonie Cent. Sch. Dist., 487 N.Y.S.2d 696 (Sup. Ct. 1985). The case was dismissed for failure to exhaust administrative remedies.

Brandon E. v. Wisconsin Dep't of Pub. Instruction, 595 F. Supp. 740 (E.D. Wis. 1984). The claim was dismissed for failure to exhaust administrative remedies.

M.R. v. Milwaukee Pub. Schs., 584 F. Supp. 767 (E.D. Wis. 1984). The court ruled that the parents failed to exhaust administrative remedies.

Williams v. Overturf, 580 F. Supp. 1365 (W.D. Wis. 1984). The claim was dismissed for failure to exhaust administrative remedies.

Timms *ex rel.* Timms v. Metropolitan Sch. Dist. of Wabash County, Ind., 722 F.2d 1310 (7th Cir. 1983). The claims by parents of a profoundly mentally retarded girl were dismissed for failure to exhaust administrative remedies.

Mountain View-Los Altos Union High Sch. v. Sharron B.H., 709 F.2d 28 (9th Cir. 1983). A student who exhibited behavioral problems was expelled from the public school and enrolled in a private school by his parents. The court ruled that no claim for tuition could be made until administrative procedures were exhausted.

Smrcka v. Ambach, 555 F. Supp. 1227 (E.D.N.Y. 1983). The court found that the parents did not exhaust administrative remedies.

Monahan v. Nebraska, 491 F. Supp. 1074 (D. Neb. 1980), *aff'd in part, vacated in part*, 645 F.2d

592 (8th Cir. 1981), *on remand*, **Rose v. Nebraska**, 530 F. Supp. 295 (D. Neb. 1981), *aff'd in part, vacated in part*, **Monahan v. Nebraska**, 687 F.2d 1164 (8th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983). Action was barred for failure to exhaust administrative remedies.

Riley v. Ambach, 508 F. Supp. 1222 (E.D.N.Y. 1980), *rev'd*, 668 F. 2d 635 (2d Cir. 1981). The district court found that a rule issued by the Commissioner of Education violated the EHCA and state education law by taking away the power of local committees on the handicapped to appropriately assign students. The rule in question defined LD children as those who exhibited a discrepancy of 50% or more between expected and actual achievement. The appeals court reversed the decision because the parents had failed to exhaust administrative remedies.

Ezratty v. Commonwealth of Puerto Rico, 648 F.2d 770 (1st Cir. 1981). The case was referred back to the local agency for administrative review and the development of an appropriate IEP.

Sessions v. Livingston Parish Sch. Bd., 501 F. Supp. 251 (M.D. La. 1980). Parents who did not follow the specified administrative procedures were denied relief in the courts.

Harris v. Campbell, 472 F. Supp. 51 (E.D. Va. 1979). This case was brought by a mother who requested an injunction, claiming that the district failed to provide her child with a FAPE. The court found that the district had, in good faith, gone to great lengths to accommodate the child, and required the mother to pursue administrative remedies before proceeding to court.

Hearing Officer Decisions & Authority

Heldman v. Sobol, 962 F.2d 148 (2d Cir. 1992). The father of a child with a disability brought this action challenging state statutes and regulations that allowed the local board of education to appoint hearing officers. The action had been dismissed at the district court level, but was reversed on appeal. The Second Circuit concluded that the father had standing to sue and that exhaustion of state administrative proceedings would have been futile.

Nelson v. Southfield Pub. Schs., 384 N.W.2d 423 (Mich Ct. App. 1986). The hearing officer erred in denying the school district the right to file briefs or present oral arguments, while providing the parents with this opportunity. The case was remanded for consideration of the school districts arguments.

Hendry County Sch. Bd. v. Kujawski, 498 So. 2d 566 (Fla. Dist. Ct. App. 1986). The hearing officer exceeded his authority by ordering residential placement for a child rather than referring the matter to the child's placement committee for a determination of the appropriate placement.

Davis v. District of Columbia Bd. of Educ., 522 F. Supp. 1102 (D.D.C. 1981), *motion to reconsider*, 530 F. Supp. 1209 (D.D.C. 1982). The court ruled that it was the hearing officer's responsibility to determine whether the placement proffered by the school district was appropriate, and not to review all possible placements and choose the most appropriate. Once an appropriate placement is identified, the district is then responsible for its funding.

Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981). The Georgia procedures for hearing officer involvement in contested placements failed to comply with the EHA because it did not provide that a decision of the hearing officer was final and binding unless appealed.

Flint Bd. of Educ. v. Williams, 276 N.W.2d 499 (Mich. Ct. App. 1979). This case involved an attempt by the public schools to have an emotionally impaired student who was frequently truant and disruptive made a ward of the court and, thus, eligible for placement by the Michigan Department of Social Services. The court of appeals ruled that such action was possible only after administrative proceedings had demonstrated that there was no program within the school system that could adequately address the student's needs. As a result, the court ordered that further administrative hearings take place.

State Review

Louis M. ***ex rel.*** **Velma M. v. Ambach**, 714 F. Supp. 1276 (N.D.N.Y. 1989). This case was a class action on behalf of New York State handicapped children challenging the procedures which were utilized by the state in securing appropriate placements. The district court held that state procedures which allow the Commissioner of Education to review decisions of impartial hearing officers violated the EHA as did the delay in review and the lack of parental input.

Hiller *ex rel.* Hiller v. Board of Educ. of Brunswick Cent. Sch. Dist., 674 F. Supp. 73 (N.D.N.Y. 1987). The State Commissioner of Education acted beyond his authority by finding that a student was not learning disabled when neither party disputed this issue.

Tompkins v. Forest Grove Sch. Dist. #15, 740 P.2d 186 (Or. Ct. App. 1987). The court found error where the administrative review officer failed to make an independent decision, but rather determined that there was evidence to support the initial referee's decision.

Muth v. Smith, 646 F. Supp. 280 (E.D. Pa. 1986). State procedures, through which the state agency could remand a case to the initial level for further hearing, violated the EHA.

Kotowicz v. Mississippi State Bd. of Educ., 630 F. Supp. 925 (S.D. Miss. 1986). Mississippi's state review panel did not meet the EHA requirement of an "impartial panel."

***In re* Michael C.**, 487 A.2d 495 (R.I. 1985). Where Rhode Island state law required a three step administrative review process, the court found that this practice must apply equally to handicapped and nonhandicapped children.

Cothern v. Mallory, 565 F. Supp. 701 (W.D. Mo. 1983). The parent's rights to due process were not affected where the state replaced its representative to a three-member review panel.

John A. *ex rel.* Valerie A. v. Gill, 565 F. Supp. 372 (N.D. Ill. 1983). The state requirement that administrative appeals be concluded within thirty days was shown not to be an excessive burden.

Vogel v. School Bd. of Montrose R-14 Sch. Dist., 491 F. Supp. 989 (W.D. Mo. 1980). The court found the state review system deficient in that (1) the initial three member panel did not provide parents with findings of fact and decision, and (2) an impartial hearing officer was not provided at the state review level.

Robert M. v. Benton, 622 F.2d 370 (8th Cir. 1980), *appeal after remand*, 634 F.2d 1139 (8th Cir. 1980). The court found that the superintendent of public instruction was an "employee of the agency" within the meaning of section 1415 of the EHA, and as such could not preside over EHCA placement meetings.

Judicial Review

Jurisdiction.

Koester v. Wellsville-Middletown R-1 Sch. Dist., 960 F.2d 69 (8th Cir. 1992). The circuit court held that the implementation of a previously required educational plan did not divest the district court of its jurisdiction over the plan. Educational services had been terminated once the student reached age twenty-one. The parents unsuccessfully appealed the cessation of services.

Oscar F. v. County of Worcester, 587 N.E.2d 208 (Mass. 1992). Parents sought an order directing the treasurer of the county to pay related costs at a private school. The placement had been ordered by a judge in a "child in need of services" (CHINS) proceeding. On appeal, the state supreme court held that the CHINS judge had the authority to refer the child to the appropriate education committee to determine an appropriate placement, but lacked the authority to select a particular special education placement at public expense.

District Sch. Bd. of Putnam County v. Roderick *ex rel.* Mercer, 593 So. 2d 1174 (Fla. Dist. Ct. App. 1992). In this case, the appeals court affirmed a hearing officer's decision that a child had not received a FAPE. Additionally, the court reviewed (1) the role of the circuit court in providing a *de novo* review under the Florida plan for educating children with disabilities, and (2) how "traditional appellate review" would result if the circuit were bypassed.

***In re* Martin K.**, 545 N.Y.S.2d 897 (Fam. Ct. 1989). The court held that it did not have jurisdiction with regard to a petition filed after August 1, 1989 regarding services for a preschool handicapped child.

Amelia County Sch. Bd. v. Virginia Bd. of Educ., 661 F. Supp. 889 (E.D. Va. 1987). Where Virginia law was found to match federal minimum guidelines of the EHA, a claim originally entered in the state courts could not subsequently be moved to the federal courts.

Antkowiak *ex rel.* Antkowiak v. Ambach, 638 F. Supp. 1564 (W.D.N.Y. 1986). The court ruled that it was a matter for trial whether the state was required to pay for the placement of a child in an nonapproved private institution.

Jose P. v. Ambach, 557 F. Supp. 1230 (E.D.N.Y. 1983). The federal court had jurisdiction to decide related state claims.

***In re* Milan Sch. Dist.**, 459 A.2d 270 (N.H. 1983). The New Hampshire Supreme Court held that appeals of Board of Education decisions are appropriately addressed in either the state superior court or federal district court, while a *writ of certiorari* to the Supreme Court was inappropriate.

Manor Indep. Sch. Dist. v. Leachelle N., 647 S.W.2d 770 (Tex. Ct. App. 1983). Once the school district brought appeal action under state law, it was required to comply with the provisions of state law. In this case, the district appealed the hearing officer decision before this was a final and official order. The court dismissed the suit.

Colin K. v. Schmidt, 528 F. Supp. 355 (D.R.I. 1981). The court found that state appeals of state administrative rulings could appropriately move to federal court.

Doe v. Anrig, 500 F. Supp. 802 (D. Mass. 1980). The court lacked jurisdiction to decide the case which did not properly proceed through administrative channels.

***In re* Pavone**, 389 N.Y.S.2d 249 (Fam. Ct. 1976). The family court did not have jurisdiction to decide the case of a child between the ages of five and twenty-one who was in need of special education.

Parties.

State *ex rel.* Clinton Area Vocational Sch. v. Dandurand, 766 S.W.2d 169 (Mo. Ct. App. 1989). The appeals court ruled that the trial court lacked the authority to add the vocational school as a party to an existing proceeding, as the school had not been afforded the opportunity for notice and a hearing prior to entry of the order.

Edward B. v. Brunelle, 660 F. Supp. 51 (D.N.H. 1986). A class was certified where the plaintiffs contended that handicapped children who were placed in residential facilities under juvenile court order were being denied a FAPE.

Louis M. *ex rel.* Velma M. v. Ambach, 113 D.R.D. 133 (N.D.N.Y. 1986). A motion for certification of class was granted.

Board of Educ. of Fairfield v. Department of Educ. of Conn., 503 A.2d 1147 (Conn. 1986). It was not necessary to name the hearing board as a party to suit in order to challenge its decision in court.

William S. v. Gill, 98 F.R.D. 463 (N.D. Ill. 1983). Class status was granted where challenges existed regarding the "educational" and "noneducational" components of related services.

Board of Educ. of New Britain v. Connecticut State Bd. of Educ., 461 A.2d 997 (Conn. Super. Ct. 1983). A local board could not appeal a placement decision without including the student and parents as parties.

***In re* Eric G.**, 649 P.2d 1140 (Hawaii 1982). Under Hawaii law, the Department of Education was not an aggrieved "person," and, as a result, was not allowed to appeal a hearing officer decision. However, the Department was an aggrieved "party" and as such could bring independent action under the EHCA.

Akers v. Bolton, 531 F. Supp. 300 (D. Kan. 1981). The plaintiffs in this case alleged that policies regarding the screening and programming for epileptic children violated the provisions of EHCA, section 504, the Fourteenth Amendment, and state requirements. The court found that the plaintiffs failed to demonstrate that a class-wide violation existed.

Statute of Limitations & Time-barred Action.

Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980 (5th Cir. 1992). The district court previously had found the action to be time-barred for it had been more than two years (Texas statute of limitations for personal injury cases as applied under the RA) since the plaintiff last attended high school. That decision was reversed on appeal, where the circuit court ruled that tolling should have begun not on the last day plaintiff was a student, but rather on her eighteenth birthday. Accordingly, the action was not time-barred since plaintiff filed on the last day possible. (Her twentieth birthday was September 9, 1991, making September 8, 1991 the last day she could file. Since September 8 was on a Sunday, she was allowed to file on September 9, which she did.)

Richards v. Fairfax County Sch. Bd., 798 F. Supp. 338 (E.D. Va. 1992). A student with severe learning disabilities was awarded a diploma and informed that the district had met its obligation of providing the plaintiff with educational services. The parents eventually filed a complaint under the IDEA, section 504, section 1983, and related state laws. The district court held that each of the claims was time barred.

Elizabeth K. ***ex rel.*** **Patricia K. v. Warrick County Sch. Corp.**, 795 F. Supp. 881 (S.D. Ind. 1992). The district court held that Indiana's thirty-day statute of limitations for judicial review of administrative decisions would apply to a dispute regarding the assignment of a child to a developmental kindergarten class.

Smith v. Henson, 786 F. Supp. 43 (D.D.C. 1992). The school district decided to educate several LD children in a public school, although they received instruction in a private school the previous year, and notified the parents that they had fifteen days to challenge the proposed change. The court held that the district violated the parents' procedural rights by imposing a fifteen-day time limit to file for an impartial hearing and that the district should have participated in the development of the IEPs that were delivered in the private school.

G.D. v. Westmoreland Sch. Dist., 783 F. Supp. 1532 (D.N.H. 1992). The court held that the applicable state statute of limitations required a thirty-day period which began from the date of the hearing officer's decision. In the present case, the thirty-day limit was not met, resulting in the dismissal of part of the complaint.

Gertel v. School Comm. of Brookline Sch. Dist., 783 F. Supp. 701 (D. Mass. 1992). The court allowed a motion to dismiss, because the action were brought after the thirty-day limit prescribed by Massachusett's law governing state administrative determinations had expired.

Hall v. Knott County Bd. of Educ., 941 F.2d 402 (6th Cir. 1991). The court found that both a one-year and a five-year statute of limitations was exceeded since tolling began when the student turned twenty-one.

Eastman v. Virginia Polytechnic Inst. and State Univ., 732 F. Supp. 665 (W.D. Va. 1990), *aff'd*, 939 F.2d 204 (4th Cir. 1991). The lower court found the action by a university employee who requested damages under the RA was time barred and dismissed the case. On appeal, the court found that the plaintiff failed to state a claim which would lead to the relief she sought and dismissed the case on those grounds.

I.D. v. Westmoreland Sch. Dist., 788 F. Supp. 632 (D.N.H. 1991). The parents appealed a hearing officer's decision of their child's IEP. The motion was dismissed because it was filled beyond the thirty-day limit. The court noted that the time for filing began on the date of the hearing officer's decision, not on the date that the decision was actually received by the parents, notwithstanding the fact that it was served through the mail.

Morse v. University of Vt., 776 F. Supp. 844 (D. Vt. 1991) *aff'd in part, rev'd in part, and remanded*, 973 F.2d 122 (2d Cir. 1992). Applying Vermont's three-year statute of limitations for personal injury claims, the court found that the claim that the university violated the RA by failing to accommodate the plaintiff's handicap was time barred.

Baker v. Board of Regents of Kan., 768 F. Supp. 1436 (D. Kan. 1991). The court applied a two-year statute of limitations where the plaintiff alleged handicap discrimination in his admission to medical school and found the action time barred.

School Bd. of York v. Nicely, 408 S.E.2d 545 (Va. Ct. App. 1991). A one-year period of limitations for personal actions was applied in a Virginia case where the school board challenged its responsibility to pay annual costs of approximately $100,000 for the private placement of a twenty-one year old handicapped man.

Board of Educ. of Katonah-Lewisboro Sch. Dist. v. Board of Educ. of Carmel Cent. Sch. Dist., 549 N.Y.S.2d 322 (Sup. Ct. 1989), *aff'd*, 571 N.Y.S.2d 333 (App. Div. 1991). A one-year statute of limitations was applied where one school district filed a claim for tuition against a second district. The claim was time barred.

Bow Sch. Dist. v. Quentin W., 750 F. Supp 546 (D.N.H. 1990). A hearing officer found the school district placement to be inappropriate and ordered reimbursement for the parents' private school expenses, and the school district appealed. The applicable statute of limitations was thirty days under New Hampshire law, and the action was dismissed as time barred.

Spiegler v. District of Columbia, 866 F.2d 461 (D.C. Cir. 1989). Suit brought by parents claiming that their child was not receiving an appropriate education was initially dismissed as time barred. On appeal, however, the court ruled that although the thirty-day time limit for petition for review of an agency action was appropriate, it did not apply in the present case because the defendant failed to give adequate notice to the parents of the thirty-day time period.

Janzen v. Knox County Bd. of Educ., 790 F.2d 484 (6th Cir. 1986). The court applied a three-year statute of limitations as specified under Tennessee law for actions "performed but not paid for" and found the action was time barred.

Thomas v. Staats, 633 F. Supp. 797 (S.D.W. Va. 1986). Under applicable West Virginia law, the statute of limitations for review of administrative hearings was 120 days. However, the limitation was waived in the instant case since the attorney who represented the plaintiff at the hearing suffered a severe heart attack and was unable to proceed with the case within the allotted period of time.

Kirchgessner *ex rel.* Kirchgessner v. Davis, 632 F. Supp. 616 (W.D. Va. 1986). The court found the thirty-day state statute of limitations for appeal of due process proceedings to be inconsistent with the EAHCA, so it applied Virginia's general one-year statute of limitations.

Adler *ex rel.* Adler v. Education Dep't of State of N.Y., 760 F.2d 454 (2d Cir. 1985). The court applied a four-month statute of limitations, finding that this more closely met the EHA spirit of ensuring prompt review than the parentally requested three-year limit.

Department of Educ. of Haw. v. Carl D., 695 F.2d 1154 (9th Cir. 1983). The thirty-day limit for administrative appeals under the Hawaii Administrative Procedures Act was applied to EHCA cases.

Right of Action/Standing.

Grace B. v. Lexington Sch. Comm., 762 F. Supp. 416 (D. Mass. 1991). A mother and child sought enforcement of a hearing officer decision. The court held that the plaintiffs had no right of action under IDEA, which provides the right to court appeals only to aggrieved parties. The court did have the right to enforce the hearing officer decision under section 1983, however.

Board of Educ. of Seneca Falls Cent. Sch. Dist. v. Board of Educ. of Liverpool Cent. Sch. Dist., 728 F. Supp. 910 (W.D.N.Y. 1990). An autistic child was placed out-of-district, consistent with an IEP developed with the consent of the parents. The receiving district later notified the sending district that it would no longer serve the child. The child had been in the program for only three weeks, while the sending district was given three additional weeks notice so that it might identify/prepare an appropriate program. As a result, the sending district sought to enjoin the other district from unilaterally removing the child, given the "stay-put" provision of the EHA. The court ruled that the sending district did not have standing.

Andrews v. Ledbetter, 880 F.2d 1287 (11th Cir. 1989). Local school districts sued their own state education agency in an attempt to compel it to provide a FAPE for the state's handicapped children. The circuit court held that local districts do not have standing to sue under the EHA in order to force the state to provide needed services.

Gehman v. Prudential Property and Casualty Ins. Co., 702 F. Supp. 1192 (E.D. Pa. 1989). The parents of a three-year-old child, who suffered severe head injuries due to an auto accident, requested reimbursement for educational services from the family insurance carrier. In response, the insurance carrier filed under the EHA, claiming that it had no responsibility to pay the specified costs. The court found that the insurance company did not have standing to sue under the EHA and dismissed the case.

Susan R.M. *ex rel.* Charles L.M. v. Northeast Indep. Sch. Dist., 818 F.2d 455 (5th Cir. 1987). A father who granted managing conservatorship to the State Department of Human Services in an effort to facilitate his daughter's placement in a psychiatric hospital did not have standing to request that his school district of residence fund this placement.

Robinson v. Pinderhughes, 810 F.2d 1270 (4th Cir. 1987). Where court action was brought in an effort to enforce a hearing officer decision, neither the handicapped child nor his mother was an aggrieved party with a right to sue under the EHA. Notwithstanding, the plaintiffs did have the right to sue under section 1983, based on a violation of due process.

Allstate Ins. Co. v. Bethlehem Area Sch. Dist., 678 F. Supp. 1132 (E.D. Pa. 1987). Allstate insurance covered the cost of a full-time attendant who cared for the tracheostomy needs of a student who was injured in an automobile accident. After covering these expenses for several years, the insurance company claimed that the attendant was a "related service" under the EHA and brought action to compel the district to cover these costs during the school day. The court found that the insurance company did not have standing under the EHA or the Rehabilitation Act, and the case was dismissed.

Gallagher v. Pontiac Sch. Dist., 807 F.2d 75 (6th Cir. 1986). The plaintiff did not demonstrate a legal cause of action under the EHA, section 504, or the Fourteenth Amendment.

Salvador v. Bennett, 622 F. Supp. 438 (N.D. Ill. 1985), *aff'd*, 800 F.2d 97 (7th Cir. 1986). A neurologically handicapped student who claimed that a university failed to accommodate his handicap brought action requesting that the Secretary of Education cut off section 504 funding to the university. The court found that the student did not have standing to bring suit.

Tschanneral v. District of Columbia Bd. of Educ., 594 F. Supp. 407 (D.D.C. 1984). The mother of a severely handicapped child was found to have a private right of action under EHCA.

Moot.

Jenkins v. Squillacote, 935 F.2d 303 (D.C. Cir. 1991). The district challenged a hearing officer decision regarding sufficiency of notice and private placement of a student with disabilities. The issue was declared moot given the completion of the school year.

Merrifield v. Lake Cent. Sch. Corp., 770 F. Supp. 468 (N.D. Ind. 1991). Under Indiana law, educational services to students with disabilities ceased at age eighteen, so the request for compensatory services for the twenty-three year-old plaintiff was dismissed as moot.

Greene *ex rel.* Greene v. Harrisville Sch. Dist., 771 F. Supp. 1 (D.N.H. 1990). The issue was moot since the school year in question had ended.

McDowell v. Fort Bend Indep. Sch. Dist., 737 F. Supp. 386 (S.D. Tex. 1990). The court declared moot a claim that a twenty-three year-old handicapped person had received inadequate education. The parents had been seeking declaratory and injunctive relief.

S-1 *ex rel.* P-1 v. Spangler, 650 F. Supp. 1427 (M.D.N.C. 1986), *vacated*, 832 F.2d 294 (4th Cir. 1987). The parents of a handicapped student settled their claim for tuition reimbursement with the school district, but continued to pursue action against the State Board of Education and its Chairman. The court found the latter claim was moot since the parents had already received the relief they sought.

Students of Cal. Sch. for the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984), *vacated*, 105 S. Ct. 1820 (1985), *remanded*, 760 F.2d 238 (9th Cir. 1985). The appeals court upheld a preliminary injunction requiring seismic testing at a proposed site for the state school for the blind. The state proposed to move the school from Berkeley to Fremont and parents took issue, claiming a violation of the RA and the EHA where the proposed school site was not tested to determine if it met state seismic safety standards codified as part of the California Education Code and enjoyed by mainstream children. While the issue of seismic testing was moot when the case reached the Supreme Court, the case was remanded for consideration of related issues.

Carter v. Orleans Parish Pub. Schs., 725 F.2d 261 (5th Cir. 1984). Where the plaintiff's children were mistakenly placed in special education classes, no violation of section 504 existed. The case was dismissed as moot since the students no longer attended these classes and there was no anticipation that they would be placed in these classes again in the future.

William S. v. Gill, 591 F. Supp. 422 (N.D. Ill. 1984). The case was dismissed as moot when the child moved to another school district.

Board of Educ. of Rocky Point Union Free Sch. Dist. v. Ambach, 467 N.Y.S.2d 946 (App. Div. 1983). The case was dismissed as moot since the child had already repeated the grade in question.

Pitts v. Board of Educ. of Reorganized Sch. Dist. R-IX of Grundy County, 568 S.W.2d 595 (Mo. Ct. App. 1978). A boy who had sought a special education placement since the seventh grade found his suit dismissed as moot because by the time the case could be completed, he would have finished his senior year.

Burden of Proof.

Tracey T. v. McDaniel, 610 F. Supp. 947 (N.D. Ga. 1985). The court ruled that the burden of proof on appeal rests with the party challenging the previous decision.

Interdepartmental & Interagency Procedures

Rogers v. Bennett, 873 F.2d 1387 (11th Cir. 1989). In this case, the Georgia Board of Education and Georgia school districts brought action against the United States Department of Education claiming that the Office of Civil Rights did not have the authority to investigate parental complaints concerning educational opportunities available in Georgia. The circuit court upheld the district court decision that the plaintiff had failed to exhaust administrative remedies under the RA.

Guy J. v. Commissioner, N.H. Dep't of Educ., 565 A.2d 397 (N.H. 1989). This case was filed to compel the commissioners of the Department of Education and Department of Health and Human Services to adopt more satisfactory procedures for settling disputes between departments regarding their responsibilities to serve children with disabilities. The state supreme court held that existing procedures complied with existing law and affirmed the lower court decision dismissing the complaint.

Ramon *ex rel.* Ramon v. Soto, 889 F.2d 981 (9th Cir. 1989), *amended*, 916 F.2d 1377 (9th Cir. 1989). Students who attended a Bureau of Indian Affairs, off-reservation boarding school, claimed that they were being expelled or suspended without appropriate due process. Since the school was not under the control of the state, the court found that the EHCA was not binding. A special master appointed to investigate the issue found that BIA regulations required similar due process in the case of suspension and expulsion, and the court awarded attorney fees.

Bermudian Springs Sch. Dist. v. Commonwealth, Dep't of Educ., 475 A.2d 943 (Pa. Commw. Ct. 1984). Local school districts sought to prevent an intermediate unit, which had traditionally provided educational services for EMR students from these school districts, from ending its direct services. The court ruled that the obligation to provide an education falls on the local district, and the unit had no obligation to seek approval from the districts before ending its services.

Parks v. Pavkovic, 557 F. Supp. 1280 (N.D. Ill. 1983). The state scheme for appropriating educational costs between several state departments left educational bills unpaid and caused private institutions to refuse to provide an education to children with disabilities. The court found this system to be violative of the Fourteenth Amendment and ordered the Illinois State Board of Education to rectify the situation.

Nevada County Office of Educ. v. Superintendent of Pub. Instruction, 197 Cal. Rptr. 152 (Ct. App. 1983). Administrative procedures for the referral of services between the State Department of Health Services and the State Department of Education were found to be appropriate.

Parks v. Pavkovic, 536 F. Supp. 296 (N.D. Ill. 1982). An Illinois district court issued a preliminary injunction requiring that residential facility tuition be paid so that a student would not be discharged from the facility while claims raised under EHCA were being litigated.

Parks v. Illinois Dep't of Mental Health and Developmental Disabilities, 441 N.E.2d 1209 (Ill. App. Ct. 1982). The Department of Mental Health and Developmental Disabilities sought to access parents "relative liability" for the residential costs incurred by their children. The court disallowed the assessment and ruled that EHA regulations affect "all political subdivisions of the State that are involved in the education of handicapped children."

Placement & FAPE

Appropriate Placement/Services

Hampton Sch. Dist. v. Dobrowolski, 976 F.2d 48 (1st Cir. 1992). The circuit court affirmed the district court decision that the district had provided an LD child with an appropriate program.

Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164 (S.D.N.Y. 1992). The court held that the continuation of the previous IEP was inappropriate, but that the state did not violate the IDEA by requiring that the future placement be in a school included on that state approved list.

Cordero *ex rel.* Bates v. Pennsylvania Dep't of Educ., 795 F. Supp. 1352 (M.D. Pa. 1992). This class action successfully challenged Pennsylvania's procedures for appropriately serving its special need students. Of particular concern were the delivery of appropriate programs, placement of children in private schools; and the inclusion of children with disabilities with other children.

Barnett v. Fairfax County Sch. Bd., 721 F. Supp. 755 (E.D. Va. 1989), *aff'd*, 927 F.2d 146 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 175 (1991). Plaintiffs were requesting that the cued speech program available in a high school five miles from the student's home be duplicated in the local high school. The court held that the district was not required to duplicate the service. Had the student been successful in this case, the district proposed that it could receive as many as seventy-eight similar requests.

Doyle v. Arlington County Sch. Bd., 953 F.2d 100 (4th Cir. 1991). The parents of a child with a profound learning disability challenged the appropriateness of the IEP prepared by the local board. The circuit court held that the lower court failed to give due weight to state administrative findings and remanded the case with specific directions.

***In re* Conklin**, 946 F.2d 306 (4th Cir. 1991). The addition of weekly tutoring brought the school district into compliance with the EHA regarding the educational program for a dyslexic child.

J.S.K. *ex rel.* J.K. v. Hendry County Sch. Bd., 941 F.2d 1563 (11th Cir. 1991). The court found that the district proposed IEP was adequate even though it did not provide maximum benefit to the child.

Chris C. *ex rel.* Barbara C. v. Gwinnett County Sch. Dist., 780 F. Supp. 804 (N.D. Ga. 1991). The parents of a child with Down's Syndrome challenged a district decision to transfer their child from a program for mildly mentally handicapped persons to one serving those who were moderately mentally handicapped. The court upheld the district decision and found it to be appropriate.

Fagan v. District of Columbia, 136 F.R.D. 5 (D.D.C. 1991). The public school could be compelled to provide the plaintiff with information regarding (1) private schools that provided services to handicapped students with public school district funding; (2) the special education qualifications of teachers in these private schools; (3) the handicapping conditions of children placed in private schools; and (4) the placement of children with handicapping conditions similar to the plaintiff's.

Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990). The plaintiff had severe developmental delays following an autistic pattern maladaptive autistic behaviors including self-stimulation, self-abusiveness, nonattending behaviors, and social withdrawal. A summer program had not been included in the child's IEP, although he had been enrolled in one for several years. In a comparatively complex case, the court concluded that the parents had waived their right to a properly constituted IEP meeting, and that the student was not entitled to an ESY.

Chris D. v. Montgomery County Bd. of Educ., 753 F. Supp. 922 (M.D. Ala. 1990). The school district was ruled to have failed to develop an appropriate IEP for the emotionally conflicted child and failed to counsel and educate his parents so that they might follow through with programming at home. The court ordered the district to adopt and implement the IEP developed by an independent consultant.

Angevine v. Jenkins, 752 F. Supp. 24 (D.D.C. 1990). While under the EHA, a child's program need not be "potentially maximizing," but it must provide some educational benefit. With this in mind, the court found that the parentally chosen private school was appropriate and that the public school where the child did not advance was inappropriate.

Hiller *ex rel.* Hiller v. Board of Educ. of Brunswick Cent. Sch. Dist., 743 F. Supp. 958 (N.D.N.Y. 1990). A student's poor performance was due to his lack of effort rather than to an inadequate IEP.

Eva N. v. Brock, 741 F. Supp. 626 (E.D. Ky. 1990). The court held that the Kentucky School for the Blind was not required to alter its program and to admit blind students who were also profoundly mentally retarded. To properly serve the child, the school would have had to hire new faculty and to alter its current mission and programs. However, the court added that if an appropriate placement could not be provided elsewhere, admission to the School eventually could be required.

Timothy W. v. Rochester, N.H., Sch. Dist., 875 F.2d 954 (1st Cir. 1989). The district court had ruled that the school district was not responsible for providing a child with special education because the multiple handicapped, profoundly mentally retarded child was not capable of benefitting from education. On appeal, the circuit court held that the EHA did not require that handicapped children be able to demonstrate they could benefit from special education in order to be eligible for that education. The court justified its decision by pointing out that the EHA included terms such as "zero-reject," "first priority," and "all" handicapped children. The court noted that the EHA required education even for children who were hospitalized, which plaintiff was not, but did not guarantee that children will learn.

Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988), *cert. denied, sub nom.*, **Central Columbia Sch. Dist. v. Polk**, 109 S. Ct. 838 (1989). In applying the standards under *Rowley*, the court noted that "the use of the term 'meaningful' indicated that the court expected more than de minimis benefit" from education.

Leonard *ex rel.* Leonard v. McKenzie, 869 F.2d 1558 (D.C. Cir. 1989). Parents of a child with serious learning disabilities and emotional problems sued a local school district claiming that the IEP for their child was inappropriate. The hearing officer had determined that both the district-proposed placement and the parentally-preferred placement were appropriate, but ordered the private placement due to a defective notice of placement and other procedural violations. The circuit court held (1) that the parents failed to show that the district placement was inappropriate, and (2) that the private school was not the child's current educational placement because it was to be for only one year, and the parents had received notice to that effect. The parents wanted their child placed in the Lab School because it offered drama and woodshop, and had an academic club and media center. The district placement did not have the aforementioned, but could meet the needs of the child with other offerings.

School Bd. of Campbell County v. Beasley, 367 S.E.2d 738 (Va. App. Ct. 1988), *rev'd*, 380 S.E.2d 884 (Va. 1989). A review officer ruled that a local school district had not provided a handicapped student with a FAPE, but the trial court disagreed. On appeal, the state court of appeals reversed the trial court's opinion, but later found its own opinion reversed by the state supreme court. The state high court reasoned that the appeals court had substituted its own notion of sound educational policy for those of the school authorities and had erred in holding that the trial court's decision was "plainly wrong or without evidence to support it."

Digre v. Roseville Schs. Indep. Dist. No. 623, 841 F.2d 245 (8th Cir. 1988). The court held that the parent was not entitled to a preliminary injunction enjoining the district from placing her child in a special education program pending a determination of his proper placement which was being appealed. The court ruled that his current placement was a special education placement, notwithstanding the fact that he had moved briefly from the district to live with his father.

Corbett *ex rel.* Corbett v. Regional Center for the East Bay, Inc., 676 F. Supp. 964 (N.D. Cal. 1988), *modified*, 699 F. Supp. 230 (N.D. Cal. 1988). In an earlier case, the court issued an injunction, based on the stay-put provision, that prevented the Department of Social Services (DSS) from removing Jack Corbett from his present placement at the Regional Center during the pendency of hearing. However, this injunction did not prevent the DSS from attempting to delicense the facility based on legitimate health and safety concerns.

Garrick B. *ex rel.* Gary B. v. Curwensville Area Sch. Dist., 669 F. Supp. 705 (M.D. Pa. 1987). There was sufficient evidence that the plaintiff was LD rather than MR. Nevertheless, his placement in a mixed category program serving both LD and MR individuals was appropriate where the student progressed and his social needs were adequately met.

Board of Educ. Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 512 N.Y.S.2d 305 (Sup. Ct. 1987), *modified and aff'd*, 522 N.Y.S.2d 878 (App. Div. 1987), *aff'd*, 531 N.Y.S.2d 889 (N.Y. 1988). A community of Hasidic Jews sought special education programming within their private, segregated facilities. The school district contended that it was only obligated to provide services to full-time students in public schools. The court found that state law allowed these students to be dually enrolled in private and public schools where their special needs were to be addressed.

Taylor *ex rel.* Holbrook v. Board of Educ. of Copake-Taconic Hills Cent. Sch. Dist., 649 F. Supp. 1253 (N.D.N.Y. 1986). The child's educational program, which was recommended by the district, was not sufficient to provide educational benefit.

Clevenger v. Oak Ridge Sch. Dr., 573 F. Supp. 349 (E.D. Tenn. 1983), *rev'd and remanded,* 744 F.2d 514, 517 (6th Cir. 1984). The court found that "[c]ost can be a legitimate consideration when devising an appropriate program for individual students. Nevertheless, cost considerations are only relevant when choosing between several options, all of which offer an 'appropriate' education."

Wilson v. Marana Unified Sch. Dist., No. 6, 735 F.2d 1178 (9th Cir. 1984). Plaintiff had cerebral palsy and physical handicaps. The district proposed to transfer her to a school with a teacher certified to teach physically handicapped children. The court upheld the district decision and ruled that a FAPE had been provided.

Halderman v. Pennhurst State Sch. and Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd,* 612 F.2d 84 (1979), *rev'd and remanded,* 451 U.S.1 (1984). Mentally retarded residents at a habilitation facility claimed that they were being denied their rights under constitutional and statutory law due to inadequate care and habilitation. The lower court found that the residents' commitment justified some degree of habilitation; however it distinguished between the mentally ill who might benefit from "treatment" and the mentally retarded who require habilitation. The court also prescribed specific guidelines for the use of force, drugs, and physical restraints after it found that the plaintiffs were unconstitutionally abused. The Supreme Court reversed the case, however, finding that the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (42 U.S.C. §§ 6000 *et seq.*) was basically a funding act which specified congressional preference. It did not create a right to appropriate treatment of handicapped individuals in the LRE.

Doe v. Lawson, 579 F. Supp. 1314 (D. Mass. 1984), *aff'd,* 745 F.2d 43 (1st Cir. 1984). The seven town special education collaborative program was found sufficient to meet the child's educational needs.

Ahern v. Keene, 593 F. Supp. 902 (D. Del. 1984). The district program was adequate to meet the child's needs, even though the parentally preferred residential placement may have been more emotionally beneficial to the child.

David H. v. Spring Branch Indep. Sch. Dist., 569 F. Supp. 1324 (S.D. Tex. 1983). When a school district could not locate an appropriate public placement for an LD child, it offered a placement in a class for the mentally retarded. The court concluded that a *prima facie* case of discrimination under section 504 existed. The court awarded $24,000 for the private school placement.

Grkman *ex rel.* Grkman v. Scanlon, 528 F. Supp. 1032 (W.D. Pa. 1981), *vacated and remanded,* 707 F.2d 1391 (3d Cir. 1982), *on remand,* 563 F. Supp. 793 (W.D. Pa. 1983). A generalized IEP and standardized placement used routinely with deaf students did not concretely address the individual needs of a deaf child and was found to be inappropriate. The court ordered that a current evaluation and IEP be developed prior to making a determination of the appropriate placement.

Hessler v. State Bd. of Educ. of Md., 700 F.2d 134 (4th Cir. 1983). The circuit court held that the parents must show that the proposed public school placement was inadequate, rather than assert that the private placement was more appropriate because it involved less commuting time and a greater opportunity to associate with nonhandicapped children. The proposed program was not necessarily inappropriate simply because the preferred placement was more appropriate or better in the eyes of the parents.

Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 116 (1982). Amy Rowley was deaf, but was an excellent lip reader. In an effort to communicate with her and her parents, the district installed a teletype machine and provided Amy with an FM hearing aid. Local school administrators took a course in sign language interpretation, while Amy's IEP included tutorial instruction and assistance from a speech therapist. A sign language interpreter was not provided on a permanent basis, because it was proven unnecessary during a brief trial period. Amy was progressing from grade to grade and was receiving educational benefit from her existing program. The Supreme Court found that equal educational opportunity was not the appropriate standard and that Congress did not intend districts to provide the "best" education possible. The Court required only that an appropriate IEP be provided and Amy's existing program meet that mandate. The Court reasoned that "the intent of the Act was more to open the door of public education to children with disabilities on appropriate terms than to guarantee any particular level of education once inside."

Buchholtz v. Iowa Dep't of Pub. Instruction, 315 N.W.2d 789 (Iowa 1982). The Iowa Supreme Court concluded that state law required an appropriate program rather than one that was the best or one that would provide maximum benefit.

Association for Retarded Citizens of N.D. v. Olson, 561 F. Supp. 470 (D.N.D. 1981). The court found that under the due process clause, mentally retarded individuals who are committed to institutions must be provided a minimum level of treatment designed to offer the hope of improvement, and the right of freedom from harm.

Norris v. Massachusetts Dep't of Educ., 529 F. Supp. 759 (D. Mass. 1981). The school district was unsuccessful in reversing a state decision regarding a child's day school placement.

Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47 (N.D. Ala. 1981). The court found the district program deficient in that (1) it did not teach skills that may make the child more independent, (2) it did not detail evaluation and record keeping procedures, and (3) it offered no opportunity for the child to have contact with nonhandicapped peers.

Pinkerton v. Moye, 509 F. Supp. 107 (W.D. Vir. 1981). The child's placement at a school six miles further away than the elementary school closest to home was found adequate to meet the child's needs.

Shanberg v. Commonwealth, Secretary of Educ., 426 A.2d 232 (Pa. Commw. Ct. 1981). The court ruled that an adequate program was all that was required under EHA despite parent claims that the proffered program was not the best.

Commonwealth v. School Comm. of Springfield, 417 N.E.2d 408 (Mass. 1981). The court held that it was appropriate to use public school funds to provide private school placements for handicapped children where public placements were not available or were inadequate. It concluded that such aid was not "substantial," and did not have the "primary purpose" of aiding private schools. Failure to pay such tuition would violate the EHCA requirement calling for appropriate placement.

Lora v. Board of Educ. of N.Y., 456 F. Supp. 1211 (E.D.N.Y. 1978), *vacated and remanded*, 623 F.2d 248 (2d Cir. 1980). The district court held that the transfer of students into racially segregated special education day schools violated the due process procedures contained in EHA. On appeal, the circuit court said that discriminatory intent rather than impact was required to trigger a constitutional violation.

***In re* Pautz**, 295 N.W.2d 635 (Minn. 1980). The parents of a Down's Syndrome child who had been enrolled in a private school brought action to compel the school district to provide an adequate public placement. The court found that the program previously offered by the district was inadequate to meet the child's needs and ordered the State Commissioner of Education to locate an appropriate placement.

Board of Educ. of Manchester v. Connecticut State Bd. of Educ., 427 A.2d 846 (Conn. 1980). Where the school district and the parents had agreed upon a private school placement and were awaiting state approval, the parents did not harm their claim by their unilateral movement of their child to the proposed placement.

Lombardi v. Nyquist, 406 N.Y.S.2d 148 (App. Div. 1978). The child's constitutional and statutory rights were not denied where the Commissioner of Education failed to approve the state institution that would most adequately meet the child's needs.

Frederick L. v. Thomas, 419 F. Supp. 960 (E.D. Pa. 1976), *aff'd*, 557 F.2d 373 (3d Cir. 1977). The district violated state statutes which required special programs for LD students. The court found that a fair and substantial relationship must exist between the state's objective to educate all its students, the means it employed to do so, and the validity of these means when compared to expert opinion.

***In re* Lash**, 401 N.Y.S.2d 124 (Fam. Ct. 1977). The parents of a handicapped child refused to allow his placement into a special education program, and the district sought court ordered participation. The family court found that the parents were not neglectful, since they were providing certified teachers who spent fourteen to twenty hours per week with the child, but instructed them to be more cooperative in the future.

Cuyahoga County Ass'n for Retarded Children & Adults v. Essex, 411 F. Supp. 46 (N.D. Ohio 1976). Where some children were prevented from attending either the traditional public school system or a system of segregated training centers for the mentally retarded, the court found a rational and legitimate classification of children who were "incapable of profiting substantially from further instruction." The court also found that a range of program options allowed for the education of retarded children as funds were available, but held that the method of assignment to special education classes was deficient.

Frederick L. v. Thomas, 408 F. Supp. 832 (E.D. Pa. 1976). The court found merit in constitutional claims of handicap discrimination based on the insufficiency of programs for LD children, and as a result denied a motion to dismiss the case.

***In re* Warren A.**, 385 N.Y.S.2d 590 (App. Div. 1976). New York Education Law required services for a schizophrenic child as well as those who were emotionally and mentally handicapped.

***In re* Lofft**, 383 N.Y.S.2d 142 (Fam. Ct. 1976). The Commissioners of Education and Mental Hygiene were ordered to cooperate with the court to find a special educational plan to meet the child's needs where a local program was unavailable.

Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971). An injunction was granted to prohibit the indiscriminant denial of education to handicapped mentally retarded students.

Length of Day

Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285 (5th Cir. 1991). The school district proposed a four-hour school day for a child with profound physical and mental handicaps. The court found this program to be sufficient to provide educational benefit while evidence presented suggested that a full school day would be detrimental.

Kerkam v. District of Columbia Bd. of Educ., 672 F. Supp. 519 (D.D.C. 1987), *rev'd sub nom. and remanded*, **Kerkam v. McKenzie**, 862 F.2d 884 (D.C. Cir. 1988), *rev'd sub nom.*, **Kerkam *ex rel.* Kerkam v. Superintendent, D.C. Pub. Schs.**, 931 F.2d 84 (D.C. Cir. 1991). An extended day program for a severely retarded student qualified as a FAPE, notwithstanding the fact that the student may have made more educational progress in a residential facility.

Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618 (6th Cir. 1990). The court held that an IEP which provided for only one hour of home instruction per day was reasonably calculated to enable the child to receive educational benefits and thus met the requirements of the EHA.

Length of Year/Extended School Year (ESY) & Summer Programs

Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298 (9th Cir. 1992). The plaintiffs alleged that the school district had written policies that worked to deny consideration for ESY services for eligible children. The case was dismissed, however, because the plaintiffs failed to exhaust administrative remedies.

Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1391 (1991). The court upheld the school district's decision that an autistic child was not entitled to an ESY, but noted that districts must consider the student's tendency to regress, prior regression, ability to recoup, and progress toward educational goals.

Johnson *ex rel.* Johnson v. Independent Sch. Dist. No. 4 of Bixby, Tulsa County, Okla., 921 F.2d 1022 (10th Cir. 1990). The court remanded the case finding insufficient evidence to support an ESY program for the severely handicapped eight-year-old child. Regression-recoupment data were limited and supporting evidence was inconclusive.

Williams *ex rel.* Williams v. Gering Pub. Schs., 463 N.W.2d 799 (Neb. 1990). A twelve-month program was required to provide a FAPE for a profoundly retarded child with congenital blindness and spastic quadriplegia. However, residential placement was not necessary to provide educational benefit.

Koch v. Walter, U.S. Dist. Ct., No. C 87-7265 (N.D. Ohio, Feb. 21, 1989). This consent agreement, which served as a model for the Ohio State law in this area, provided that: (1) the local school shall notify parents that their child may be considered for ESY; (2) that determination for ESY services must be made on an individual basis; (3) that the determination for ESY services may be made prospectively or may consider whether the child is failing or likely to fail to meet annual short term objectives; (4) that renewal is not automatic year to year; (5) that if ESY services are identified as necessary by the IEP team, these services must be included on the child's IEP and provided at no cost to parents; and (6) that services do not automatically renew for subsequent years.

B.G. *ex rel.* F.G. v. Cranford Bd. of Educ., 702 F. Supp. 1140 (D.N.J. 1988); (supplement to original case) 702 F. Supp. 1158 (D.N.J. 1988). A year-round, residential placement was found to be appropriate for a multihandicapped student with severe emotional disturbance, neurological impairment, and lack of socialization skills. In a supplemental decision, the court denied reimbursement to a Youth Behavior Program that the student attended after school prior to the residential placement decision. This program was not educational in nature, did not assist in meeting the student's educational needs, and was not on the state approved list.

Holmes v. Sobol, 690 F. Supp. 154 (W.D.N.Y. 1988). The school district had to provide physical therapy during the summer months for a child suffering from Caudal Regression Syndrome. The injunction was granted since regression in the child's physical condition and the length of recoupment time would affect the student's educational ability in the fall.

Garland Indep. Sch. Dist. v. Wilks, 657 F. Supp. 1163 (N.D. Tex. 1987). The parents sought reimbursement for the supplemental services they acquired for their handicapped child. The child received these services after school hours and during the summer. The court concluded that the IEP was inappropriate and that residential care should have been provided. The supplemental services also did not represent an "appropriate placement." However, the court required reimbursement because the supplemental services were all that could be afforded by the parents in their efforts to provide the child with a FAPE. The court reasoned that the parents should receive more than an "empty victory."

Bucks County Pub. Schs., Intermediate Unit No. 22 v. Department of Educ., 529 A.2d 1201 (Pa. Commw. Ct. 1987). The school district appealed an order of the Secretary of Education that the district was required to pay for the costs of a residential summer school for an emotionally disturbed student. The court held that the district must pay for the summer program in light of the evidence that the student suffered emotional, behavioral, and social regression following even a short break in her educational program.

Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986). The school district filed suit after it had been required to provide a handicapped child with full summer services and out-of-district transportation. The appeals court ruled that the district was required to provide both a structured summer program and the requested out-of-district transportation for the plaintiff, so that his working mother could rely on a custodian to care for him until she could pick him up.

Schwartz v. County of Nassau, 489 N.Y.S.2d 274 (App. Div. 1985). A handicapped child's mother sought an order directing the county to pay her child's tuition and maintenance costs at summer camp. A family court had entered a summary judgment in favor of the mother, but no decision had been made by the placement committee as to the appropriateness of such experiences, or as to whether camp should be included within the IEP. As a result, the appellate court ruled that a summary judgment was inappropriate, and that the factual disputes needed resolving.

Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F. Supp. 1263 (N.D. Ga 1981), *aff'd*, 716 F.2d 1565 (11th Cir. 1983), *reh'g denied*, 721 F.2d 822, *vacated and remanded*, 104 S. Ct. 3581 (1984), *on remand*, 740 F.2d 902 (11th Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985). The Georgia organization brought suit alleging that a state policy of restricting the education of handicapped children to no more than 180 days violated federal and state statute. On appeal, the court found that the plaintiffs had valid claims under the EHA and section 504. On remand, and based on the Supreme Court ruling in ***Smith v. Robinson***, the court held that section 504 could not be a basis for suit of EHA claims.

Yaris v. Special Sch. Dist. of St. Louis County, 558 F. Supp. 545 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984). A class action was brought seeking declaratory and injunctive relief against continued application of the defendant's policy, which precluded the provision of educational programs for handicapped children in excess of the traditional nine-month school year. The district court found the policy to be in violation of federal law, because no individualized determinations were made. Also, it was observed that some programs for nonhandicapped children were available in the summer months. The court ordered the district to consider the needs of the plaintiffs in developing their IEPs, but did not order that extended year programs be provided. The circuit court upheld the district court decision.

Rettig v. Kent City Sch. Dist., 539 F. Supp. 768 (N.D. Ohio 1981), *aff'd in part, vacated in part and remanded*, 720 F.2d 463 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 2379 (1984), *on remand*, 788 F.2d 328 (6th Cir. 1986). A number of violations were alleged in this case, among which was a denial of an ESY. The plaintiff at one time had such a program, but appeared to regress over the summer with or without the additional instruction. All parties agreed that the plaintiff could benefit from the summer program, but the district court concluded that federal law does not require that the "best" education be provided. The district court was unwilling to order a summer placement, but did direct the district to provide the program if the plaintiff's IEP at a later date required it. On appeal, the circuit court concluded that the additional programs requested by the plaintiff were not necessary to permit him to benefit from instruction.

Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983). Plaintiffs in this case argued that a school system may not refuse to offer extended year programs to handicapped children unless such determination was based on a series of individualized evaluations and judgments. The court noted that each IEP must provide the child with some educational benefit and that a lack of funding could not bear more heavily on the handicapped than on the nonhandicapped child.

Garrity v. Gallen, 522 F. Supp. 171 (D.N.H. 1981), *aff'd*, 697 F.2d 452 (1st Cir. 1983). The lower court did not abuse its discretion by ruling that any student who demonstrated severe regression and had significant difficulty recouping lost skills as a result of interruptions in educational programming was entitled to extended year services.

Stanton *ex rel.* Stanton v. Board of Educ. of the Norwich Cent. Sch. Dist., 581 F. Supp. 190 (N.D.N.Y. 1983). The question of school officials' negligence was deemed a matter for trial where they knew that certain neurologically impaired students required twelve-month programming but failed to provide it.

Phipps v. New Hanover County Bd. of Educ., 551 F. Supp. 732 (E.D.N.C. 1982). This action was brought on behalf of three children with cerebral palsy who were being denied an extended year program. The court granted a preliminary injunction to the district, because the plaintiffs had not exhausted administrative remedies even though the case was filed under section 504, rather than the EHA.

Stacey G. *ex rel.* William G. v. Pasadena Indep. Sch. Dist., 547 F. Supp. 61 (S.D. Tex. 1982). The court found that a year round program for an autistic student was appropriate in light of the serious regression the child suffered over the summer months.

Birmingham and Laphere Sch. Dists. v. Superintendent of Pub. Instruction for Mich., 328 N.W.2d 59 (Mich Ct. App. 1982). The state court upheld the authority of the local hearing officer to order the school districts to provide summer enrichment activities for selected handicapped children. The activities were noninstructional in nature.

Bales v. Clarke, 523 F. Supp. 1366 (E.D. Vir. 1981). The plaintiff sought reimbursement for costs of a summer program and transportation expenses incurred by his parents. There had been no determination by school officials that a summer program was required for the child, or that the public school placement was inappropriate. The court concluded that federal law does not require that the best education possible be provided, but rather mandates that the program be appropriate. Furthermore, the transportation requirement in federal law involves the child and not the parent. Given the above, the court found no violation of either state or federal law.

Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), *aff'd sub. nom.*, **Battle v. Commonwealth of Pa.**, 629 F.2d 269 (3d Cir. 1980), *on remand*, 513 F.

Supp. 425 (E.D. Pa. 1981), *cert. denied sub nom.*, **Scanlon v. Battle**, 449 U.S. 1109 (1982). In this case, the state of Pennsylvania had an administrative policy that stipulated that no child, handicapped or not, would be provided more than 180 days of instruction per year. The court concluded that such a policy was incompatible with the EHA mandate that each child's IEP be based on individualized judgments. However, the circuit court rejected the lower court's standard of "self sufficiency."

Anderson v. Thompson, 495 F. Supp. 1256 (E.D. Wis. 1980), *rev'd*, 658 F.2d 1205 (7th Cir. 1981). Although he may have benefitted from summer programming, the child's regression and recoupment period were not sufficiently significant to require that it be included within the IEP.

Frietsch v. Ambach, 432 N.Y.S.2d 640 (App. Div. 1980). New York Education Law required the Department of Education to provide for the education of visually impaired children ten months of the year. Although the local school district was responsible for providing the service during the summer months, it could request state reimbursement for related expenses.

Mahoney v. Administrative Sch. Dist. No. 1, 601 P.2d 826 (Or. Ct. App. 1979). Year-round, residential placement was ordered for a mentally retarded child. The school district agreed with the placement, but argued that state law disallowed payment for services beyond 180 days. Finding that the EHCA required "appropriate" programming, the appeals court disagreed with the district's reasoning, and ordered payment for year-round services.

Schneps v. Nyquist, 393 N.Y.S.2d 275 (Sup. Ct. 1977), *modified and aff'd*, 396 N.Y.S.2d 275 (App. Div. 1977). The court held that a decision to designate a ten-month calendar for funding the education of handicapped students was neither irrational nor unreasonable, and that the district had no obligation to provide educational services during the months of July and August.

Number of Years

Helms v. Independent Sch. Dist. No. 3 of Broken Arrow, 750 F.2d 820 (10th Cir. 1984), *cert. denied*, 471 U.S. 1019 (1985). The court ruled that special education services for individual children cannot be limited to twelve years of education when other children routinely repeat grades.

Least Restrictive Environment

Gaudiello v. Delaware County Intermediate Unit, 796 F. Supp. 849 (E.D. Pa. 1992). The parents alleged a violation of section 504, among other claims, challenging the district's decision to mainstream their physically disabled child. The court granted summary judgment to the district reasoning that section 504 did not provide a cause of action where plaintiffs asserted an equal protection claim to a publicly financed special education. The EHA was held to be the exclusive avenue for related claims.

Oberti v. Board of Educ. of Borough of Clementon Sch. Dist., 789 F. Supp. 1322 (D.N.J. 1992). Motions for summary judgment were denied in the present case where parents challenged the district decision to place their child in a segregated placement outside the district, rather than in a mainstream classroom in the neighborhood school. In denying the motions, the court reasoned that genuine issues of material fact remained regarding whether it would be feasible to educate the child in the regular classroom, given that the kindergarten teacher had not received adequate assistance the previous year to determine if the mainstream, or another more restrictive placement, would be appropriate for the "extremely disruptive" child.

P.J. ex rel. W.J. v. Connecticut Bd. of Educ., 788 F. Supp. 673 (D. Conn. 1992). The court held that the district had failed to properly evaluate the plaintiff, that a written IEP must be prepared, and that if a placement that was not fully integrated was selected, the district must justify its decision. The parents also had requested that they receive reimbursement for their out-of-pocket expenses incurred over a two-year period. The court denied the request and reasoned that although the existing IEP may not have been provided in the LRE, the parentally-selected private programs were inappropriate as well (i.e., neither was staffed with trained professionals needed to provide speech and language therapy or physical and occupational therapy, while classroom teachers were not certified in special education). Accordingly, reimbursement under ***Burlington*** was not required.

Board of Educ., Sacramento City Unified Sch. Dist. v. Holland, 786 F. Supp. 874 (E.D. Cal. 1992). A moderately mentally retarded child had been placed half-time in the mainstream and half-time in a special education class. The parents sought a full-time regular education placement and were successful. The court held that if the child failed to flourish under this placement, which included supplemental services, then "adjustments could be made."

Greer *ex rel.* Greer v. Rome City Sch. Dist., 762 F. Supp. 936 (N.D. Ga. 1990), *aff'd*, 950 F.2d 688 (11th Cir. 1991). By applying the ***Daniel R.R.*** standards, the court determined that a placement team must consider whether the child could achieve some educational benefit in a mainstream setting. In this case, the court found error where the school district made no attempt to accommodate the child with Down's Syndrome in a regular class.

Gillette *ex rel.* Gillette v. Fairland Bd. of Educ., 725 F. Supp. 343 (S.D. Ohio 1989), *rev'd*, 932 F.2d 551 (6th Cir. 1991). Parents of a dyslexic child were ruled by the district court not to be entitled to reimbursement for private school costs during their child's seventh and eighth grades because they had failed to request a due process hearing prior to enrolling him at the school. However, the IEP for the tenth grade was found not to have met the LRE requirement, and reimbursement was required. On appeal, the circuit court held that the lower court had (1) failed to give proper deference to prior administrative findings that supported the public placement as least restrictive, and (2) approved the private school placement of the child notwithstanding the fact that such placement was more restrictive than that proposed by the district.

French v. Omaha Pub. Schs., 766 F. Supp. 765 (D. Neb. 1991). The benefits that a hearing impaired student might have received from a "mainstream" placement were found to be far outweighed by the benefits from a segregated, all-signing environment at the school for the deaf.

School Dist. of Kettle Moraine v. Grover, 755 F. Supp. 243 (E.D. Wisc. 1990). An integrated program at a neighborhood high school was held to be appropriate to meet the student's needs and was less restrictive than the parentally preferred segregated facility.

Liscio *ex rel.* Hippensteel v. Woodland Hills Sch. Dist., 734 F. Supp. 689 (W.D. Pa. 1989), *aff'd without pub. opinion*, 902 F.2d 1561 (3d Cir. 1990). The court held that a mentally retarded child may be placed in specialized classes for academic subjects, but that he should be mainstreamed with nonhandicapped peers for nonacademic subjects to the maximum extent possible.

DeVries *ex rel.* DeBlaay v. Fairfax County Sch. Bd., 674 F. Supp. 1219 (E.D. Va. 1987), *rev'd and remanded sub nom.*, **DeVries *ex rel.* DeBlaay v. Spillane**, 853 F.2d 264 (4th Cir. 1988), *aff'd sub nom.*, **DeVries *ex rel.* DeBlaay v. Fairfax County Sch. Bd.**, 882 F.2d 876 (4th Cir. 1989). In this case, the court upheld the IEP of an autistic child and reasoned that he could not be accommodated at the high school nearest his home even with the use of supplemental aids and services. As a result, he was placed in a vocational center located within the public high school.

Briggs v. Board of Educ. of Conn., 882 F.2d 688 (2d Cir. 1989). Plaintiff suffered from a moderate to severe sensorineural hearing loss in both ears and mild to moderate speech and language delays. The school district proposed that he needed a preschool program for hearing-impaired children, including a special summer program. However, the parents wanted him to be educated with nonhandicapped children and selected a private placement which provided the necessary instruction, but also provided for the desired interaction. The district court had granted the parents' motion for judgment, but that decision was reversed on appeal. The Second Circuit held that the lower court failed to give proper deference to the judgment of the agency experts.

Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989). A Down's Syndrome, mentally retarded, and speech impaired child was removed from the mainstream and placed in a self-contained classroom. The parents claimed that the district violated the LRE requirement of the EHA. The court upheld the act of the district and noted that although the district had failed to reevaluate the child before altering his placement, such an act did not violate the EHA given that the parents refused to consent to new evaluations. The child had "failed to thrive" in the mainstream even with significant teacher assistance.

Martinez *ex rel.* Martinez v. School Bd. of Hillsborough County, Fla., 861 F.2d 1502 (11th Cir. 1988), *on remand*, 711 F. Supp. 1066 (M.D. Fla.

1989). The court ordered that a child with AIDS be admitted to a regular trainable mentally handicapped classroom, given that the risk of transmission from contact with body fluids was not "significant."

Evans v. District No. 17, 841 F.2d 824 (8th Cir. 1988). Plaintiff was unsuccessful in her effort to acquire a twenty-four hour residential placement. The court held that the district had met EHA requirements and that it had the duty to provide an LRE; this requirement, according to the court, required the district to make an attempt to provide the plaintiff with in-home and after school instruction which would allow her to remain with her family.

A.W. *ex rel.* N.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158 (8th Cir. 1987). The court upheld a severely mentally retarded child's placement in a county school notwithstanding the parents' demand for a public school placement. Any benefit the child would have received in the public school would have been minimal and, in the court's opinion, would not justify the loss of benefits to the other handicapped children.

Board of Educ. of East Windsor Regional Sch. Dist. v. Diamond, 808 F.2d 987 (3d Cir. 1986). A residential placement was ruled to be the appropriate placement for a multihandicapped child, notwithstanding the district's claim that the day program was the LRE. The court reasoned that the district proposed placement would not provide a FAPE.

Mark A. v. Grant Wood Area Educ. Agency, 795 F.2d 52 (8th Cir. 1986). The multi-handicapped plaintiff was receiving services in an integrated (handicapped and nonhandicapped) private school setting. Public school officials proposed that the child could be better served in a segregated, public, special education program. The parents rejected the proposed change. The court upheld the public placement, and noted that the public school did not have to provide the "best education possible."

St. Louis Developmental Disabilities Treatment Center Parents' Ass'n v. Mallory, 591 F. Supp. 1416 (W.D. Mo. 1984), *aff'd*, 767 F.2d 518 (8th Cir. 1985). An advocacy group brought action challenging the state system of special education where many students with severe functional handicaps were placed in segregated facilities when they could have benefitted from interaction with nonhandicapped students. The court held that this claim was an impermissible shift in theory from the position relied upon at trial, and thus affirmed the lower court judgment in favor of the defendants.

Jackson v. Franklin County Sch. Bd., 606 F. Supp. 152 (S.D. Miss. 1985), *aff'd*, 765 F.2d 535 (5th Cir. 1985). A learning disabled student who had been involved in a sex-related incident in his mainstream school was denied readmission following his return from psychiatric evaluation and treatment. School officials claimed that they had not yet prepared an appropriate educational program for him and refused to admit him to the mainstream as an interim placement. The parents rejected all of the proposed plans because they did not include placement in the local public school. The district court upheld the act of the district reasoning that the plaintiff's presence in the mainstream would pose a threat to himself and others, given his prior conduct both in and out of school (one related incident involved a three-year-old girl). That decision was upheld on appeal to the Fifth Circuit.

Bonadonna v. Cooperman, 619 F. Supp. 401 (D.C.N.J. 1985). The court held that mainstreaming, with part-time one-on-one therapy, was appropriate. The district had previously proposed that the child be educated in a facility for the hearing impaired.

Matthews *ex rel.* Matthews v. Davis, 742 F.2d 825 (4th Cir. 1984). The plaintiff child was provided a day school program for severely and profoundly retarded children, although he previously had been educated in a residential facility. The day program would enable him to live at home. The court held that the day program was an appropriate placement provided in the LRE.

Victoria L. *ex rel.* Carol A. v. District Sch. Bd., 741 F.2d 369 (11th Cir. 1984). A learning disabled student was transferred from a high school to an alternative learning center and requested a preliminary injunction to allow her to attend the high school during pendency of the proceedings. The district court judge denied the request and the plaintiff appealed. The Eleventh Circuit upheld the district court's decision, notwithstanding the plaintiff's "stay-put" claim, noting that no procedural rights had been violated and that evidence failed to show that the proposed placement was inappropriate. (In addition to breaching school rules such as smoking, skipping classes, and insubordination, she had brought weapons to school and threatened to injure or kill another student.)

Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983). All parties agreed that the plaintiff could not be effectively educated in the mainstream, but disagreed as to an appropriate placement. The First Circuit held that where unique conditions of a severely retarded child demanded that he receive round-the-clock training and reinforcement in order to make any educational progress, the child may be placed in a residential program, notwithstanding the parents' demand that he be placed in a day school.

Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983). Plaintiff was a nine-year-old severely mentally retarded child with a mental age of two to three. He was prone to seizures and required almost constant supervision because of his inability to recognize dangerous situations. The district placement for the plaintiff was in a county school specially designed to educate mentally retarded children. The parents refused the placement in part due to the fact that their child would not have the opportunity to interact with nonhandicapped children. In the alternative, they proposed that he be placed in special classes in a regular public school. The district court had ruled in favor of the district, finding that the plaintiff made no significant progress after eighteen months in the parentally preferred placement. That decision was vacated on appeal to the Sixth Circuit, where the court concluded that (1) the court should determine whether the services which make a segregated facility superior can be provided in a nonsegregated setting, and (2) there is a strong preference for mainstreaming, although some children may need to be educated separately if they would not benefit from mainstreaming or if they would be a disruptive force in the nonsegregated setting. The court also noted that "cost" can be a factor, since excessive spending on one handicapped child can deprive other handicapped children. In the present case the court reasoned that the plaintiff's lack of progress was not dispositive since the district court still must determine whether he could have been provided with additional services which could have improved his performance.

Johnston *ex rel.* Johnson v. Ann Arbor Pub. Schs., 569 F. Supp. 1502 (E.D. Mich. 1983). A handicapped student was transferred from a less to a more restrictive placement and claimed that such an act violated the Fourteenth Amendment, section 504, and the EHA. The court ruled that the transfer did not implicate rights under the Constitution; that plaintiff had not been discriminated against due to handicap; and that the plaintiff would not achieve a satisfactory education in the less restrictive placement, even with the use of supplemental aids and services. The school district supported its case with test results, expert opinion, etc., while the plaintiff relied only on testimony from her mother (a nonexpert). The court reasoned that it would be as inappropriate to substitute the opinion of the mother for that of school experts as it would be to substitute its own opinion.

Bailey v. Unified Sch. Dist. No. 345, 664 P.2d 1379 (Kan. 1983). The parents of a visually impaired child failed to convince the court that their child should be mainstreamed.

Springdale Sch. Dist. #50 of Wash. County v. Grace, 494 F. Supp. 266 (W.D. Ark. 1980), *aff'd*, 656 F.2d 300 (8th Cir. 1981), *vacated and remanded*, 102 S. Ct. 3504 (1982), *reaff'd*, 693 F.2d 41 (8th Cir. 1982). The court held that although the child might learn more quickly at a special school for the deaf, an appropriate program could be provided for her at a public school with a certified teacher of the deaf.

Lang v. Braintree Sch. Comm., 545 F. Supp. 1221 (D. Mass. 1982). The parents of a mentally retarded, mentally ill, and epileptic eighteen-year-old child wanted the public school to pay for the placement of their child in a private school (with a year-round program). The public school, however, proposed a new IEP with a public school placement. The court ruled on behalf of the district, noting that the IEP was appropriate and that it met the LRE requirement.

Mallory v. Drake, 616 S.W.2d 124 (Mo. Ct. App. 1981). The parents of a severely handicapped youngster challenged her placement in the state school, requesting an LRE. Basing its reasoning of the needs of the individual child, the court affirmed the hearing officer decision that the residential placement was inappropriate.

Residential, Psychiatric & Hospital Placements

Woods *ex rel.* T.W. v. New Jersey Dep't of Educ., 796 F. Supp. 767 (D.N.J. 1992). Summary judgment was denied because fact questions regarding the educational necessity of the residential placement and whether a FAPE had been provided were yet unanswered. It would have to be determined, therefore, whether the placement was necessary for educational purposes or, in the alternative, was due to medical, social, or emotional reasons.

Mark Z. v. Mountain Brook Bd. of Educ., 792 F. Supp. 1228 (N.D. Ala. 1992). The court held that a public residential facility was the appropriate placement for a child who suffered from a behavioral disorder and that his program was reasonably calculated to enable him to receive educational benefit.

Todd D. *ex rel.* Robert D. v. Andrews, 933 F.2d 1576 (11th Cir. 1991). After determining that a child with severe emotional disturbance could no longer function in the community day school, the local board of education unsuccessfully attempted to find a residential facility to meet the child's needs. The child was eventually placed in an out-of-state facility, which the court determined was the appropriate placement. The case was remanded for a determination of whether the state of Georgia was responsible for related costs, since it failed to provide an appropriate, in-state residential placement.

G.D. v. Westmoreland Sch. Dist., 930 F.2d 942 (1st Cir. 1991). The parents of a handicapped child sought residential placement for their child. The court determined that the public school district placement was appropriate; that the hearing officer gave sufficient consideration to the testimony of an independent evaluator; and that the district provided adequate notice regarding its actions to the parents.

Taylor *ex rel.* Taylor v. Secretary of Dep't of Health and Human Servs., 24 Cl. Ct. 433 (Cl. Ct. 1991). After his third DPT shot, the plaintiff became feverish and suffered a "hard generalized seizure," causing permanent generalized seizures, mental retardation, and hyperactivity. The child was eligible for monetary compensation under the National Childhood Vaccine Act (42 U.S.C. § 300aa-1 *et seq.*). However, under IDEA the school district remained responsible for residential placement, as this was determined to be the appropriate placement for the child.

Metropolitan Gov't of Nashville & Davidson County, Tenn. v. Cook, 915 F.2d 232 (6th Cir. 1990). This case dealt with the out-of-state placement of a handicapped child which was ordered by a Department of Education administrative law judge. The district court vacated the placement and ordered a new IEP, in light of new evidence concerning alternative placements. That decision was upheld by the Sixth Circuit.

Taylor *ex rel.* Taylor v. Honig, 910 F.2d 627 (9th Cir. 1990). Parents sought and received a preliminary injunction ordering the placement of their child in an out-of-state facility operating as a school and psychiatric hospital. The court reasoned that the placement was justified in the present case due to the need to have an immediate placement.

Clovis Unified Sch. Dist. v. California Office of Admin. Hearings, 903 F.2d 635 (9th Cir. 1990). The school district was held responsible for the placement of a child at a psychiatric hospital through pendency of court review. However, the court also concluded that the child was hospitalized primarily for medical, psychiatric reasons, and that hospitalization did not qualify as a related service under the EHA.

Brown v. Wilson County Sch. Bd., 747 F. Supp. 436 (M.D. Tenn. 1990). The court held that a residential rehabilitation facility for brain injury victims represented the appropriate educational placement for a brain damaged student. The court did not award compensatory education for time the child spent in an inappropriate homebound program.

Chris D. v. Montgomery County Bd. of Educ., 743 F. Supp. 1524 (M.D. Ala. 1990). This suit was brought by a twelve-year-old emotionally disabled student claiming that he had not been provided with a FAPE and that the appropriate placement was in a full-time residential school. The residential school was specially designed to provide needed behavior modification.

McClain v. Smith, 793 F. Supp. 761 (E.D. Tenn. 1989). Placement of a woman in a group home for adults had previously been ruled to be an educational placement (*see* 793 F. Supp. 756). In this companion case, the court held that the residential component of the placement was necessary educationally and that the county of the woman's legal domicile was responsible for the expenses.

Metropolitan Gov't of Nashville and Davidson County v. Tennessee Dep't of Educ., 771 S.W.2d 427 (Tenn. Ct. App. 1989). This case dealt with the appeal by a school district of a hearing officer's decision ordering the school system to reimburse the parents of a potentially suicidal handicapped child for their costs in placing their child in a psychiatric hospital. The Chancery Court reversed the hearing officer's decision and that decision was upheld on further appeal. The state court of appeals held that payment for services rendered by the psychiatrist were expressly excluded by the EHA, and that the hospital placement was not an educational placement as defined under the EHA and did not represent the LRE.

Doe v. Sanders, 545 N.E.2d 454 (Ill. App. Ct. 1989). Plaintiffs sought damages and injunctive relief because the state had failed to pay the high school tuition for maladjusted students recovering from chemical addiction who resided in homes for treatment of substance abuse in out-of-district programs. The court held that the state was required to pay the education costs of such children.

David D. v. Dartmouth Sch. Comm., 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 1790 (1986). The court determined that the town's proposed IEP was deficient under state standards, and that the child should be educated at a residential private school.

Department of Educ. v. Mr. and Mrs. S., 632 F. Supp. 1268 (D. Haw. 1986). The court granted a preliminary injunction requiring the Hawaii Department of Education to send a seventeen-year-old girl who was deaf, blind, and moderately retarded to a residential facility in Philadelphia.

Martin v. School Bd. of Prince George County, 348 S.E.2d 857 (Va. Ct. App. 1986). Residential placement was not necessary to provide a FAPE for an LD child.

Geis v. Board of Educ. of Parsippany-Troy Hills, 589 F. Supp. 269 (D.N.J. 1984), *aff'd*, 74 F.2d 575 (3d Cir. 1985). The court upheld the continued placement of a multihandicapped child in a residential placement facility rather than placement in a junior high school class for students with trainable mental retardation, given the fact that the child could better achieve educational success in the former setting.

Scituate Sch. Comm. v. Robert B., 620 F. Supp. 1224 (D.R.I. 1985). Where the day program proposed by the school district was sufficient to meet the child's needs, a residential placement was not required notwithstanding the fact that residential placement may have been more effective.

Clevenger v. Oak Ridge Sch. Bd., 573 F. Supp. 349 (E.D. Tenn. 1983), *rev'd and remanded*, 744 F.2d 514 (6th Cir. 1984). Where the local school board decided to place an eighteen-year-old emotionally disturbed child in a state program, the parent sought placement in an out-of-state private facility. The appeals court found that the only appropriate program for the child was one which offered long-term treatment, despite the additional cost to the district of $33,000 per year.

Ahern v. Keene, 593 F. Supp. 902 (D. Del. 1984). A residential placement was beneficial to the plaintiff, but was not required under the EHA. In the alternative, the court upheld the district's proposed public placement as appropriate.

Halderman v. Pennhurst State Sch. and Hosp., 533 F. Supp. 661 (E.D. Pa. 1982), *rev'd and remanded*, 707 F.2d 702 (3d Cir. 1983). The district court found that the parents of an institutionalized mentally retarded student did not have the right to control all aspects of their child's education. A special master found support for the child's transfer to a community living arrangement. On appeal, the court questioned whether the parents' right and ability to control the upbringing of their child was given sufficient deference. Additionally, the higher court found conflicting evidence regarding the benefits of the two programs for the child.

Halderman v. Pennhurst State Sch. and Hosp., 533 F. Supp. 668 (E.D. Pa. 1982). Finding that the parents probably would fail on the merits of their case, the court refused to grant a stay to prevent the move of a child from a residential institution to a community living arrangement.

San Francisco Unified Sch. Dist. v. State, 182 Cal. Rptr. 525 (Ct. App. 1982). Residential placement was appropriate notwithstanding state claims that the student's problems resulted from a poor home environment.

Harrell v. Wilson County Schs., 293 S.E.2d 687 (N.C. Ct. App. 1982). The court approved a mainstreamed placement for a hearing impaired child despite parental preference for an out-of-state residential placement.

Gladys J. v. Pearland Indep. Sch. Dist., 520 F. Supp. 869 (S.D. Tex. 1981). The court approved the residential placement of a schizophrenic child despite school district contentions that a six-hour in-school program was adequate.

Kruelle v. Biggs, 489 F. Supp. 169 (D. Del. 1980), *aff'd sub nom.*, **Kruelle v. New Castle County Sch. Dist.**, 642 F.2d 687 (3d Cir. 1981). A Delaware school district was ordered to pay for the residential placement of a profoundly retarded child notwithstanding district claims that a local, in-school placement was sufficient.

Dubner v. Ambach, 426 N.Y.W.2d 164 (App. Div. 1980), *aff'd*, 437 N.Y.S.2d 659 (N.Y. 1981). New York education law allowed placement of students in public out-of-state residential facilities. However, the parents of a child could not compel their child's attendance to a particular school.

***In re* Patrick P.**, 380 N.Y.S.2d 877 (Fam. Ct. 1976). The court found that New York law supported the position that all handicapped children with or without physical handicaps had a statutory right to an education. An emotionally disturbed child who did not have a physical impairment was entitled to residential placement based on the recommendations of the child's physician and psychologist.

Student-teacher Ratio

Pennsylvania Protection & Advocacy, Inc. v. Department of Educ., 609 A.2d 909 (Pa. Commw. Ct. 1992). This action alleged that public school teachers were often required to teach classes in excess of the maximum size allowed under state regulations and that the state had approved plans that included excessive class size. The state denied the allegations. Given the above, summary judgment was denied, since material issues of fact remained.

Karl v. Board of Educ. of Geneseo Cent. Sch. Dist., 736 F.2d 873 (2d Cir. 1984). To assure maximum achievement, the parents of a severely disabled child demanded that their child be taught in a class with a teacher/pupil ratio of six-to-one or less. The court reasoned, however, that the central issue was whether the child would receive educational benefits in a class with a ratio of twelve-to-one, not whether a ratio of six-to-one provided a better education.

Colin K. v. Schmidt, 536 F. Supp. 1375 (D.R.I. 1982), *aff'd*, 715 F.2d 1 (1st Cir. 1983). The court required an appropriate program and placement for two LD children who had accompanying emotional problems, where it found that the programs offered by the district did not meet the children's needs, and the student-teacher ratio was too high in the district proposed self-contained classroom.

Student Competency Testing

Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. 725 (C.D. Ill. 1982), *rev'd*, 697 F.2d 179 (7th Cir. 1983). Denial of a diploma to special education students who failed a minimum competency test was neither a violation of section 504 nor the EHA. However, providing only one and one-half years notice of the test requirement was a violation of due process.

Access & Facilities

Schuldt v. Mankato Indep. Sch. Dist. No. 77, 937 F.2d 1357 (8th Cir. 1991). Where another school within the district was fully wheelchair accessible and contained an integrated education program, the district was not required to modify the school nearest a child's home.

Sullivan *ex rel.* Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp. 947 (E.D. Cal. 1990). A disabled student (cerebral palsy, LD, right side deafness) was held to have been discriminated against when a school district refused her access to school if she was accompanied by a service dog. The complaint dealt with section 504 and state law, rather than the EHA. The plaintiff did not dispute the adequacy of her program or that the dog was necessary educationally. Additionally, the district claimed that it denied access only to the dog, not to the child. The court ruled that the district must allow access to the dog, finding that such access represented reasonable accommodation.

Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990). A twenty-three year-old student who had severe arthritis and was confined to a wheelchair was denied admission to the only high school in her neighborhood, allegedly because the facilities could not accommodate her handicap. Her home was approximately ten miles from the nearest paved road; travel along the road caused her great physical and emotional pain; and bad weather often made the road impassable. On a motion to dismiss, the court ruled that the plaintiff may assert constitutional damages claims; that fact issues existed as to whether the claims were time barred; and that school officials were not entitled to a sovereign immunity defense.

Hendricks v. Gilhool, 709 F. Supp. 1362 (E.D. Pa. 1989). The court ruled that the state department of education had violated section 504 and the EHA by failing to insure that nonmainstreamed handicapped children were (1) provided with facilities which were comparable to those enjoyed by nonhandicapped students, and (2) placed in LREs.

Related Services

Maintenance of Tracheotomy Tube

Granite Sch. Dist. v. Shannon M. by Myrna M., 787 F. Supp. 1020 (D. Utah 1992). The plaintiff student was in need of constant tracheostomy care if she was to attend regular classes in the mainstream, rather than receive services in a homebound program. The court reasoned that constant nursing care qualified as a "medical service" under IDEA, notwithstanding the fact that the provider of care was a nurse rather than a physician, and that mainstreaming could not be achieved satisfactorily. Finally, the court noted that the child's existing IEP requiring home instruction conferred "some educational benefit," as required under federal law.

Department of Educ., State of Haw. v. Katherine D., 531 F. Supp. 517 (D. Haw. 1982), *aff'd in part, rev'd in part*, 727 F.2d 809 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2360 (1985). The plaintiff suffered from cystic fibrosis and tracheomalacia, which caused her windpipes to be floppy instead of rigid. As a result, she wore a tracheotomy tube which allowed her to breathe and to expel mucus secretions from her lungs two or three times a day. If she was to attend school, this service must somehow be provided. However, based on the recommendation of the placement physician, the district concluded that the medical services the plaintiff might need could not be provided at the school and therefore proposed a homebound program. An administrative hearing officer concluded that the homebound program was not the LRE for Katherine and ordered the district to pay the cost of the existing private placement. The district appealed the decision, but offered a public placement to the student. Staff were to be trained to provide her with the necessary services, but were "reluctant" to do so. As a result, the child remained in the private placement. Due to the aforementioned, the circuit court ruled that the public placement would be appropriate only if the necessary services were provided.

Hymes v. Harnett County Bd. of Educ., 664 F.2d 410 (4th Cir. 1981). The plaintiff in this case had a tracheotomy tube inserted in his neck to facilitate his breathing. In order to function properly, the tube required periodic suctioning of mucus secretions. As in ***Katherine D.***, the district, rather than provide the service, recommended a homebound program. The proffered placement was found to have violated the EHA both at the state administrative level and in district court. The substantive results of the trial court were not appealed, although a claim was made regarding attorney fees.

Clean Intermittent Catheterization

Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984). Amber Tatro had spina bifida and as a result suffered from orthopedic and speech impairments and a neurogenic bladder. To attend school she required CIC services to be performed once or twice daily. The Supreme Court ruled that CIC can qualify as a health service, but is not a medical service. Because CIC did not have to be provided by a medical doctor, and because it was necessary for the student to attend school and therefore to benefit from special education, the Court required that it be provided. *See also*, 481 F. Supp. 1224 (N.D. Tex. 1979), 625 F.2d 557 (5th Cir. 1980), 516 F. Supp. 968 (N.D. Tex. 1981), and 703 F. 2d 823 (5th Cir. 1983).

Tokarcik v. Forest Hills Sch. Dist., 665 F.2d 443 (3d Cir. 1981). The plaintiff had spina bifida and was in need of CIC, which the district refused to provide. The court ruled the complaint not to be time barred and that CIC must be provided to the handicapped child as a related service.

Dady v. School Bd. of Rochester, 282 N.W.2d 328 (Mich. Ct. App. 1979). Catheterization was found to be a medical service under Michigan law.

Sherer v. Waier, 457 F. Supp. 1039 (W.D. Mo. 1977). The parents in this case brought action under the RA to require the school district to provide catheterization for their daughter. The court denied the request finding that the RA provided no private right of action, and that this should not be implied by the courts.

Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va. 1976). A child with spina bifida was excluded from regular classes, even though he was capable of participating in the mainstream. The district gave the parents three alternatives from which to choose in regard to the child's education: (1) that the mother care for the child during the school day; (2) that the child receive homebound instruction; or (3) that the child attend special education classes. The district court ruled that the exclusion of a minimally handicapped child from a regular public school classroom without a bona fide educational reason was a violation of the RA, and that a child's attendance could not be conditioned on the presence of his mother.

Psychiatric Services & Psychotherapy

Clovis Unified Sch. Dist. v. California Office of Admin. Hearings, 903 F.2d 635 (9th Cir. 1990). The school district was held responsible for the placement of a child at a psychiatric hospital through pendency of court review. However, the court also concluded that the child was hospitalized primarily for medical, psychiatric reasons, and thus did not qualify as a related service under the EHA.

Metropolitan Gov't of Nashville and Davidson County v. Tennessee Dep't of Educ., 771 S.W.2d 427 (Tenn. Ct. App. 1989). The student's placement at a psychiatric hospital and the accompanying services provided by a psychiatrist were medical rather than educational, so reimbursement of parental expenses was denied.

Max M. v. Illinois State Bd. of Educ., 529 F. Supp. 1437 (N.D. Ill. 1984), *reconsideration granted*, 629 F. Supp. 1504 (N.D. Ill. 1986). The student received psychotherapy from a psychiatrist and requested reimbursement. The court ruled that the parents were entitled to recover the sums expended, because the therapy should have been included in the child's IEP. However, the amount received by the parents could have been limited to an amount qualified district personnel would have charged had the district provided this information.

T.G. v. Board of Educ. of Piscataway, N.J., 576 F. Supp. 420 (D.N.J. 1983), *aff'd*, 738 F.2d 425 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 592 (1984). The parents of a student who had been enrolled in a facility for the emotionally disturbed received a $25,200 bill for psychotherapy services upon the child's discharge. These services were included on the student's IEP and were held to be necessary to help the child benefit from his education. The district was required to pay the bill.

D.G. v. Board of Educ., 576 F. Supp. 420 (D.N.J. 1983). The judge ruled that psychotherapy was designed as an essential service to allow the plaintiff to benefit from the educational program planned for him and that it qualified as a related service. The court noted that although the service was supervised by a trained psychiatrist, the day-to-day service actually was provided by a staff member with "no more credentials than a Master's in Social Work. . . ."

Darlene L. v. Illinois State Bd. of Educ., 568 F. Supp. 1340 (N.D. Ill. 1983). The plaintiff had a severe behavior disorder and was assigned to a psychiatric hospital. The state did not approve of the placement, because such placements violate state policy and include medical treatment. The district court upheld the state and argued that the EHA did not require participating districts or states to provide medical services such as those proposed in this case.

McKenzie v. Jefferson, 566 F. Supp. 404 (D.D.C. 1983). The public school was not required to fund an emotionally handicapped child's hospitalization at a private psychiatric hospital as a related service to special education. The placement at the hospital was for medical and not for educational reasons.

Papacoda v. Connecticut, 528 F. Supp. 68 (D. Conn. 1981). The court ruled that psychological services that were required to assist an emotionally disturbed student to benefit from special education were related services under the EHA and must be provided without cost to the parents.

***In re* A Family**, 602 P.2d 117 (Mont. 1979). The Montana Supreme Court determined that psychotherapy provided to an emotionally disturbed child who was placed in a residential setting pursuant to his IEP was a related service under the EHA despite the fact that the state board of education had promulgated regulations which considered psychiatric therapy to be outside the definition of related services.

Counseling and Therapeutic Services

Gary B. v. Cronin, 542 F. Supp. 102 (N.D. Ill. 1980). This pre-**Rowley-Tatro-Smith** case, among other issues, dealt with standing to sue when the state refused to provide counseling and therapeutic services. The court ruled that the plaintiffs had stated claims for relief under the EHA, section 504, and the Fourteenth Amendment.

Nursing Care

Detsel *ex rel.* Detsel v. Sullivan, 895 F.2d 58 (2d Cir. 1990). This child with multiple physical impairments received twenty-four hour nursing care in her home which was covered by Medicaid. The novel issue before the circuit court was whether the child could reasonably be denied those same services during the school day. The court held that the student was entitled to Medicaid payment for services received while attending public school. (The plaintiff had previously failed to attain nursing services under IDEA.)

Macomb County Intermediate Sch. Dist. v. Joshua S., 715 F. Supp. 824 (E.D. Mich. 1989). The court required the school district to provide transportation and necessary health services to a severely multiply impaired student, absent a finding that a licensed physician would be required to provide the services. The court disagreed with the rationale proposed in both ***Detsel*** (1986) and ***Bevin H.*** (1987).

Detsel v. Board of Educ., 637 F. Supp. 1022 (N.D.N.Y. 1986), 820 F. 2d 587 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 495 (1987). The court held that the EHA did not require a school district to provide a severely physically disabled child with constant in-school nursing care. The extensive services would require the attention of an LPN or registered nurse, rather than a school nurse. The court ruled that the therapeutic health services sought by the plaintiff more closely resembled the medical services specifically excluded by the EHA and reasoned that even though the requested services did not fulfill the "physician" requirements set forth by law, the exclusion of the disputed services was in keeping with its spirit.

Bevin H. v. Wright, 666 F. Supp. 71 (W.D. Pa. 1987). The plaintiff required full-time nursing services resulting from severe multiple physical and mental handicaps. Relying on the rationale from ***Detsel*** (1986), the court found that the nursing services requested were too vast and varied to be included as related services under IDEA.

Medication Administration

DeFalco *ex rel.* DeFalco v. Deer Lake Sch. Dist., 663 F. Supp. 1108 (W.D. Pa. 1987). The school district was not deficient under section 1983 by a single incident of failing to provide medication to a diabetic student.

Bertens v. Stewart, 453 So. 2d 92 (Fla. Dist. Ct. App. 1981). The court held that the school board rule that students not personally possess medicine, as applied to a fifth-grade student's possession and distribution of nonprescription vitamin pills, was so vague it failed to meet due process requirements.

O'Brien v. Township High Sch. Dist., No. 214, 392 N.E.2d 615 (Ill. App. Ct. 1979). The court ruled that the state immunity statute did not bar a student complaint alleging that he was medically and surgically treated by an untrained student. In this case, the court stated that "[w]hen medical treatment is undertaken by a school or its agent, public policy considerations dictate an obligation to ensure that it is competently rendered."

Climate Control

Espino v. Besteiro, 520 F. Supp. 905 (S.D. Tex. 1981). The plaintiff was placed in an air conditioned plastic cubicle in order to provide him with a climate controlled environment. Initially, the cubicle did not have a sound system to assist in communication. The court ruled that such segregation violated the child's rights and enjoined the practice. Following the resolution of this complaint, the child was placed in a private school that provided an air conditioned classroom.

Substance Abuse

Field v. Haddonfield Bd. of Educ., 769 F. Supp. 1313 (D.N.J. 1991). After various attempts to establish the appropriate diagnosis and placement for a tenth grade student, his parents placed him in a substance abuse program. There was no dispute that the child qualified as a person with a disability under IDEA; however, the plaintiffs contended that the child's education was adversely affected by his substance abuse. The court examined the nature of the program, and determined it to be a "medical treatment" rather than a "medical diagnosis," and as a result did not qualify as a related service.

Sign-language Interpreter, Cued Speech, Lip Reading, Total Communication

Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190 (9th Cir. 1992). The parents brought suit to compel the district to provide a sign language interpreter for their deaf child in a parentally-selected private religious school. The circuit court held that to provide such aid would violate the establishment clause, while the failure to provide such aid did not violate the free exercise clause, given the presence of a compelling state interest.

Goodall v. Stafford County Sch. Bd., 930 F.2d 363 (4th Cir. 1991). The court held that neither Virginia law nor the EHA required the school board to provide a deaf student with a cued speech interpreter at a private religious school.

Barnett v. Fairfax County Sch. Bd., 721 F. Supp. 757 (E.D. Va. 1989), *aff'd*, 927 F.2d 146 (4th Cir. 1991). Plaintiffs were requesting that the cued speech program available in a high school five miles from the student's home be duplicated in the local high school. The court held that the district was not required to duplicate the service. (Had the student succeeded in this case, the district proposed that it could receive as many as seventy-eight similar requests.)

Rothschild v. Grottenthaler, 725 F. Supp. 776 (S.D.N.Y. 1989), *aff'd in part, vacated and remanded in part*, 907 F.2d 286 (2d Cir. 1990). The court found that deaf parents were eligible to receive the services of a sign language interpreter at district expense at "school-initiated conferences incident to the academic and/or disciplinary aspects of their child's education." On appeal, the court clarified that if parents wished to have an interpreter at graduation ceremonies and other extra-curricular activities, they must do so at their own expense.

Rothschild v. Grottenthaler, 716 F. Supp. 796 (S.D.N.Y. 1989). The deaf parents of hearing children requested that the school district provide them with a sign language interpreter at school initiated functions, such as parent-teacher conferences. The school district refused, and the parents initiated court action. The court found that, under the RA, the school had an obligation to provide reasonable accommodation to "otherwise qualified" handicapped persons, which included parents as well as students.

Lachman v. Illinois State Bd. of Educ., 852 F.2d 290 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 308 (1988). The district proposed IEP, which provided for sign language education and inclusion in a segregated classroom, was appropriate to meet the needs of a deaf child.

Visco *ex rel.* Visco v. School Dist. of Pittsburgh, 684 F. Supp. 1310 (W.D. Pa. 1988). A deaf mother sought to maintain her two deaf children in the private placement where they had been receiving education for several years. The school district wished to transfer the children to a recently developed in-district program for hearing impaired students. While the court noted its restriction on determining appropriate educational methods, it found that a special need for lip reading existed in the children's home. The private placement, which incorporated lip reading, was found to be appropriate.

Woolcott v. State Bd. of Educ., 351 N.W.2d 601 (Mich. Ct. App. 1984). This complaint emerged because the district failed to fund a cued speech interpreter for the plaintiff. The legal questions which were resolved, however, dealt with the appropriateness of summary judgment, proper parties, and money damages.

Board of Educ. v. Rowley, 458 U.S. 116 (1982). The plaintiff, Amy Rowley, was deaf, but was an excellent lip reader. In an effort to communicate with her and her parents, the district installed a teletype machine and provided Amy with an FM hearing aid. Local school administrators took a course in sign language interpretation, while Amy's IEP included tutorial instruction and assistance from a speech therapist. A sign language interpreter was not provided on a permanent basis, because it was proven unnecessary during a brief trial period. Amy was progressing from grade to grade and was receiving educational benefit from her existing program. The Supreme Court found that equal educational opportunity was not the appropriate standard and that Congress did not intend districts to provide the "best" education possible. The Court required only that an appropriate IEP be provided and that Amy's existing program met that mandate. *See also*, 483 F. Supp. 528 (S.D.N.Y. 1980), 632 F.2d 945 (2d Cir. 1980).

Jones v. Illinois Dep't of Rehabilitation Servs., 504 F. Supp. 1244 (N.D. Ill. 1981), 689 F.2d 721 (7th Cir. 1982). The district court previously ruled that the Department had the primary burden of providing an interpreter to a deaf college student, while failure to do so was a violation of the RA. The circuit court decision dealt primarily with attorney fees.

Age v. Bullitt County Pub. Schs., 673 F.2d 141 (6th Cir. 1982). The court found that the district proposed "total communication" approach was appropriate to meet the needs of the child.

Silvio v. Commonwealth, Dep't of Educ., 439 A.2d 893 (Pa. Commw. Ct. 1982). The public school placement, which incorporated a system of total communication, was appropriate to meet the needs of a hearing impaired child.

Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977). The district court ruled that the plaintiff was an otherwise qualified handicapped person under the RA, and that she had a probable right to financial assistance for an interpreter. A preliminary injunction was issued which enjoined the college from refusing to provide the necessary funding.

Speech & Language Therapy

Krichinsky v. Knox County Schs., 963 F.2d 847 (6th Cir. 1992). The parents were ruled entitled to attorney fees, notwithstanding the fact that they were unsuccessful in obtaining a residential placement for their child, given that they did obtain increased speech, language, and occupational therapies.

Johnson v. Lancaster-Lebanon Intermediate Unit 13, Lancaster City Sch. Dist., 757 F. Supp. 606 (E.D. Pa. 1991). Although the school district provided speech and language instruction to the hearing impaired plaintiff, his parents chose to use their own funds to supplement these services. When the supplemental services were discontinued, the child made little meaningful progress in his acquisition of speech skills (two-months development over a one-year period was documented by independent specialists). The court found that the school district must increase speech and language services provided to the child and must consider testimony of independent specialists when determining the child's need for ESY services.

***In re* Children Residing at St. Aloysius Home**, 556 A.2d 552 (R.I. 1989). This case dealt with a request by a director of a private, nonprofit, residential facility for dependent and neglected children to determine whether residents had the right to participate in speech-therapy services conducted through the public schools. The state supreme court held that the residents of the facility were also residents of the town for school purposes and that they must be provided with the opportunity to participate in the municipality's special education programs, even if only on a part-time basis.

Kattan *ex rel.* Thomas v. District of Columbia, 691 F. Supp. 1539 (D.D.C. 1988). A private school placement that included speech and occupational therapy was found to be appropriate for the child.

School Dist. of Philadelphia v. Commonwealth, Dep't of Educ., 547 A.2d 520 (Pa. Commw. Ct. 1988). The court ordered the school district to provide both a multisensory and a unisensory auditory training program for a child with progressive hearing loss despite the fact that the student was progressing with multisensory training alone. The court cited an urgency in providing therapy to help the child "become more independent" and "to develop more natural language and voice quality" before residual hearing deteriorated beyond the point where natural language and voice quality were probable.

Manuel R. v. Ambach, 635 F. Supp. 791 (E.D.N.Y. 1986). The evidence supported the district proposed placement of a resource room and language therapy for an LD child.

Physical & Occupational Therapy

Tribble v. Montgomery County Bd. of Educ., 798 F. Supp. 668 (M.D. Ala. 1992). The court held that the local school district was responsible for providing speech, physical, and occupational therapy for a child unilaterally placed in a private school by his parents. Additionally, the court required the district to provide transportation between the private school and the location where the services would be provided. (Note that the court was not asked to decide whether the services could be provided in the private school.)

Howell *ex rel.* Howell v. Waterford Pub. Schs., 731 F. Supp. 1314 (E.D. Mich. 1990). This case involved claims that the "amount" and "manner" of physical and occupational therapy were inadequate. On a motion to partially dismiss the complaint or for partial summary judgment, the court held that (1) the student could not pursue issues that had not been pursued through administrative channels, but that (2) the plaintiff had stated an actionable claim under the RA.

Pittsburgh Bd. of Educ. v. Commonwealth Dep't of Educ., 581 A.2d 681 (Pa. Commw. Ct. 1990). The plaintiff was awarded compensatory physical and occupational therapy as a result of the board's denial of an appropriate program when it unilaterally terminated the therapy over a one-year period.

Habilitative Services

Burke County Bd. of Educ. v. Denton *ex rel.* Denton, 895 F.2d 973 (4th Cir. 1990). Parents had requested in-home habilitative services (twenty-four hours a day, 365 days per year) for a nineteen-year-old autistic and moderately mentally handicapped student. The court ruled that neither federal nor state law required the board to fund such services where the student was making educational progress, notwithstanding the failure of home care aides to follow a behavior management program.

William S. v. Gill, 536 F. Supp. 505 (N.D. Ill. 1982). William suffered from severe multiple handicaps including bilateral hearing loss, mental retardation, and spastic quadriplegia. After several years of successful programming at a residential school for the deaf, the family moved to a new school district which refused to continue funding the placement. The district claimed that William had many "noneducational" related service needs which it was not required to fund. The court found a violation of federal law where William had "been excluded from or denied the benefits of EAHCA 'solely by virtue of his handicap.'"

Extracurricular, After-school & Sport Activities

Texas Educ. Agency v. Stamos *ex rel.* Class of All Pub. Sch. Children, 817 S.W.2d 378 (Tex. Ct. App. 1991). The state appeals court upheld the state "no pass, no play" statute and concluded that it did not illegally discriminate against either handicapped or minority persons.

Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 735 F. Supp. 753 (M.D. Tenn. 1990), *aff'd without pub. opinion*, 908 F.2d 972 (6th Cir. 1990). An LD student was denied the right to participate in athletics due to a state athletic association's rule regarding transfer, notwithstanding the fact that the transfer, according to the judge, was necessary to allow the child to receive a FAPE. The district court upheld an administrative law judge's decision that the association had discriminated against the plaintiff.

Jackson *ex. rel.* Jackson v. Fort Stanton Hosp. and Training Sch., 757 F. Supp. 1243 (D.N.M. 1990). The court found that two state residential facilities for the severely retarded illegally discriminated against residents in violation of section 504 by denying them participation in integrated community programs. However, individual clients were required to exhaust administrative remedies before filing EHA action.

Hollenbeck v. Board of Educ. of Rochelle Township, 699 F. Supp. 658 (N.D. Ill. 1988). The wheelchair bound plaintiff wished to participate in sports with able-bodied athletes. The hearing officer found that only in sports where safety was a factor may the district establish a wheelchair division, otherwise the plaintiff must be allowed to participate on teams that were not separate. The district court found that the child's multidisciplinary team lacked the appropriate training and knowledge to determine the safety of a sport, as this team was trained in more academic issues. Furthermore, whether participation with able-bodied athletes was "appropriate" was not an issue to be decided by the IEP team based upon the initial order by the hearing officer.

Rettig v. Kent City Sch. Dist., 539 F. Supp. 768 (N.D. Ohio 1981), *aff'd in part, vacated in part and remanded*, 720 F.2d 463 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 2379 (1984), *on remand*, 788 F.2d 328 (6th Cir. 1986). The court ruled that the school district was not obligated to provide extracurricular activities to a student, where the student, because of a lack of interest and sporadic and recurring behavior, would receive no significant educational benefit from the services.

Brookline Sch. Comm. v. Golden, 628 F. Supp. 113 (D. Mass. 1986). A change in the child's after-school program was not considered a change in placement requiring notice under the EHCA.

Nichols v. Farmington Pub. Schs., 389 N.W.2d 480 (Mich. Ct. App. 1986). A hearing-impaired student who was assigned to a grade level below that which his age would normally suggest sued when he became ineligible for sports participation in high school. The court held that neither the district's failure to provide a hearing nor the association's failure to provide an exception violated the Constitution.

Cavallaro v. Ambach, 575 F. Supp. 171 (W.D.N.Y. 1983). This action was brought on behalf of a student who was barred from competing in interscholastic athletics due to age. The court held that the neurologically impaired handicapped student was prohibited from participating because he had reached the age of nineteen, and was not treated differently than any other, nonphysically handicapped nineteen-year-old student, and thus no Fourteenth Amendment or section 504 violation existed.

Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418 (D.C. Pa. 1982). The court enjoined the district from precluding a student with only one kidney from participating as a member of the school football team. The student had purchased a "flack jacket" for protection. Expert testimony indicated that permanent injury to the remaining kidney was not probable. The student was knowledgeable of the risks involved as well as the alternatives.

Mahan v. Agee, 652 P.2d 765 (Okla. 1982). The state athletic association had a rule stipulating that any student who reached his nineteenth birthday prior to September 1 was not eligible to play in interscholastic sports in any member school. The association supported the rule by arguing that older and more mature athletes could constitute a danger to the safety of younger students, and that an age restriction would reduce the likelihood that an athlete would voluntarily repeat a grade in order to gain an advantage in competition. As a result, a nineteen-year-old handicapped senior was ruled ineligible. The court ruled that the plaintiff had not been excluded because of handicap, but rather was excluded because of age.

Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980). The district court concluded that (1) there was a right to a private cause of action for monetary and injunctive relief under the RA; and (2) the board had neither the duty nor the right to deny a student the right to participate in interscholastic wrestling. The student was born with one kidney and had parental encouragement to participate.

Doe v. Marshall, 119 F. Supp. 1190 (S.D. Tex. 1978). The court concluded that the plaintiff, who had been receiving psychiatric treatment, had a compelling necessity for living apart from his parents and a compelling need to participate in football, if he was ever to become a "normal, productive adult." The student had been denied the right to participate based on a state association rule requiring transferring athletes to reside with a parent or guardian. The guardianship had to be of at least one-year in term, while the association would not recognize legal guardianships if both parents were alive.

Kampmeier v. Harris, 411 N.Y.S.2d 111 (App. Div. 1978). The court held that (1) statutory immunity from liability enjoyed by the school district under state law was not a factor to be weighed by the court in considering the best interest of the student; (2) the record supported the finding that it was in the best interest of the student to participate in the athletic program and it was reasonably safe for her to do so provided that she wear protective eye wear; and (3) the term "athletic program" applied to gym classes.

Swiderski v. Board of Educ., City Sch. Dist. of Albany, 408 N.Y.S.2d 741 (Sup. Ct. 1978). The court concluded that it was in the best interest of the student, who had defective vision in one eye, to participate in the athletic program and that it was reasonably safe for her to do so, provided she wore protective eye shields.

Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977). The circuit court ruled that to exclude a handicapped child from a school activity is not improper if there exists a substantial justification for the controlling policy. Accordingly, if a school physician determines that a child with one eye is not "otherwise qualified" to participate due to the high risk of personal injury and the possibility of injury to others, the plaintiff must be able to effectively rebut such evidence.

Colombo v. Sewanhaka Cent. High Sch. Dist. No. 2, 383 N.Y.S.2d 518 (Sup. Ct. 1976). It was ruled that school district actions disallowing a fifteen-year-old student with a hearing deficit to participate in football, lacrosse, or soccer was neither arbitrary nor capricious where the determination of the school district followed the advice of its own medical director and guidelines published by the AMA. The student's alleged loss of interest in attending school by reason of having been made to feel inferior was of secondary importance where there existed a risk of injury to himself or others.

Spitaleri v. Nyquist, 345 N.Y.S.2d 878 (Sup. Ct. 1973). The court held that the dismissal of the appeal to the Commissioner of Education regarding the football participation of a student with a loss of vision in one eye was not arbitrary, capricious, or illegal. The school physician disqualified the plaintiff, based on AMA recommendations.

Transportation

Tinkham v. Groveport-Madison Local Sch. Dist., 602 N.E.2d 256 (Ohio Ct. App. 1991). This case involved the sexual assault of a developmentally disabled child who was transported to and from school by taxi. The court ruled that the taxi company was liable for the driver's actions, but that the school district was protected by sovereign immunity regarding its decision to contract with the taxi company to transport the child.

Jane Doe "A" v. Special Sch. Dist. of St. Louis County, 682 F. Supp. 451 (E.D. Mo. 1988), *aff'd*, 901 F.2d 642 (8th Cir. 1990). A school bus driver sexually and physically abused handicapped students, and the parents sought damages from individual school district officials under section 1983. The court upheld summary judgment for the defendants finding no deliberate indifference or requisite knowledge of the bus driver's actions on the part of school officials.

McNair v. Cardimone, 676 F. Supp. 1361 (S.D. Ohio 1987), *aff'd sub nom.*, **McNair v. Oak Hills Local Sch. Dist.**, 872 F.2d 153 (6th Cir. 1989). An Ohio school child in a private facility at parental expense was denied free transportation to and from school. The court found that the district was not required to provide the service since the child was deaf and did not require special transportation to get to school.

School Bd. of Pinellas County, Fla. v. Smith, 537 So. 2d 168 (Fla. Dist. Ct. App. 1989). A school district was not required to transport a child to a geographically distant facility given that a facility within its service region was providing the child with a FAPE. The parents had requested a change of facility once they heard allegations and rumors of sexual abuse within the child's current facility. Police later determined that the allegations were unfounded.

Barwacz v. Michigan Dep't of Educ., 681 F. Supp. 427 (W.D. Mich. 1988); *see case for summary judgment at* 674 F. Supp. 1296 (W.D. Mich. 1987). The mother of a hearing impaired adolescent unilaterally transferred her daughter from a total communication program at the local public school to a school for the deaf then sought reimbursement for transportation expenses to and from the school. The court found that the program offered by the local district was appropriate and that reimbursement was inappropriate.

Work v. McKenzie, 661 F. Supp. 225 (D.D.C. 1987). The parents of a handicapped child sued when the district failed to reimburse them for transportation costs. The private school placement had been selected by the parents, even though an appropriate public placement had been offered. The court ruled for the district.

A.A. v. Cooperman, 526 A.2d 1103 (N.J. Super. Ct. App. Div. 1987). Parents of an orthopedically handicapped child sued under the EHA to compel payment of the full cost of the child's special transportation. The court held that the parents could not require reimbursement under the EHA since the child did not need special education and therefore was not handicapped as defined under that Act. Accordingly, all the child was to receive was a partial payment, which was provided all children attending private schools.

Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986). The district filed suit after it had been required to provide full summer services and out-of-district transportation. In regard to the transportation issue, the court ruled that it does not cease to be a related service simply because a parent requests that the child be taken to a site a short distance beyond the district boundaries. The mother worked days and required the assistance of a custodian immediately after school. The custodian lived one mile beyond the district boundary.

DeLeon v. Susquehanna Community Sch. Dist., 747 F.2d 149 (3d Cir. 1984). The plaintiff had been transported to school by his mother, who was reimbursed for her expenses. In the child's most recent IEP, however, the mode of transportation was not identified. The district had proposed a "combined run" where several handicapped children would be picked up and then transported in one vehicle, rather than paying each separate parent. The DeLeons bid on the transportation contract, but were not low bidders. They then refused to allow their child to participate and argued that it was detrimental to the child's education and a change of placement. The circuit court concluded that the change in method of transportation did not constitute a change in placement under the Act, and thus did not require a due process hearing.

Hurry v. Jones, 734 F.2d 879 (1st Cir. 1984). Parents were able to acquire reimbursement for transportation they provided their own child, because the district had failed to provide the service. The circuit court noted that the damages available to the parents would not be limited to actual out-of-pocket costs, but rather could include compensation for expenditure of time and effort. However, the child was not able to collect for physical and emotional hardship endured during the dispute.

Cohen *ex rel.* Cohen v. School Bd. of Dade County, 450 So. 2d 1238 (Fla. Dist. Ct. App. 1984). The student in this case attended a Georgia residential facility while his parents resided in Florida. The student's IEP maintained that family interaction was an important need, and the family sought public funding for several visits (including airfare, hotel accommodations, food, and car expenses) for the child as well as his entire family. The court found that three round trips per year for the child were sufficient to meet the requirements of the EHCA.

Dubois v. Connecticut State Bd. of Educ., 727 F.2d 44 (2d Cir. 1984). This case dealt with the right of parents to receive reimbursement under the EHA for expenses of transporting their child. The parents were ruled to have exhausted administrative remedies prior to initiating suit. However, the hearing officer was entitled to order the development of evaluative data on the child in order to determine the appropriateness of the claim. The court noted that if a school district was liable for the special placement of a student, it also was liable for the cost of transportation. On the other hand, if a student was not handicapped under the Act, the school was not liable for related costs.

Calhoun v. Illinois State Bd. of Educ., 550 F. Supp. 796 (N.D. Ill. 1982). Among other claims, the plaintiff alleged that the state had refused to authorize reimbursement for the child's travel expenses from the state of former residence. The court ruled that the plaintiff had not exhausted administrative remedies and thus was not entitled to relief.

Fallon v. Board of Educ., 447 A.2d 607 (N.J. Super. Ct. Law Div. 1982). Parents of a handicapped child sought to recover from the board interest on costs of tuition and transportation, as well as attorney fees. The court ruled that the parents were entitled to interest, but found the award of fees to be inappropriate.

Mitchell C. v. Board of Educ. of City Sch. Dist. of N.Y., 414 N.Y.S.2d 923 (App. Div. 1979). The district did not discriminate by scheduling school buses for two daily routes which forced handicapped children attending private schools to attend later hours than attended by other public school children.

Disciplining Students with Disabilities

Corporal Punishment & Other forms of Physical Punishment

Waechter v. School Dist. No. 14-030 of Cassopolis, Mich., 773 F. Supp. 1005 (W.D. Mich. 1991). A fifth-grade boy who suffered from a congenital heart defect, an orthopedic impairment, and learning disabilities was forced to run a 350-yard sprint in less than two minutes for talking in line during recess. The student suffered from cardiac arrhythmia and subsequently died. District officials were well aware of the student's heart problems and were informed by his physician that he was not to participate in competitive sports. The family filed suit under the Fifth and the Fourteenth Amendments, section 1983, the RA, and state tort law. Claims based on procedural due process and handicap discrimination were dismissed, and the court refused to rule on state law claims. The court did find basis for claims of failure to provide substantive due process where school officials knew the recess supervisor routinely employed this form of discipline, yet failed to address the behavior.

Fee v. Herndon, 900 F.2d 804 (5th Cir. 1990), *cert. denied*, 111 U.S. 279 (1991). Alleged use of excessive corporal punishment against a handicapped student did not implicate federal substantive due process considerations. Texas has legal state remedies for abuse, as well as reasonable restrictions on the use of corporal punishment.

Cole v. Greenfield-Cent. Comm. Schs., 657 F. Supp. 56 (S.D. Ind. 1986). This civil rights action was brought on behalf of a hyperactive and emotionally disturbed student against the defendants for paddling him. The court held that the disciplinary techniques employed by the school to correct student behavior did not violate the student's due process and equal protection rights.

Ingraham v. Wright, 430 U.S. 651 (1977). In this Supreme Court case, two questions were presented: whether the paddling of students as a means of maintaining school discipline constitutes cruel and unusual punishment in violation of the Eighth Amendment; and, to the extent that paddling is constitutionally permissible, whether the due process clause of the Fourteenth Amendment requires prior notice and an opportunity to be heard. The Court concluded that corporal punishment was not cruel or unusual and that it did not require due process.

In-school Suspension

Hayes *ex rel.* Hayes v. Unified Sch. Dist. No. 377, 669 F. Supp. 1519 (D. Kan. 1987) *rev'd and remanded*, 877 F.2d 809 (10th Cir. 1989). Students in a social adjustment program who had been subjected to a five-day in-school suspension brought this action. The court held that such a suspension did not result in a change of placement and that neither the Eighth nor Fourteenth Amendments nor the state tort claims act were violated.

Suspension

Webster Groves Sch. Dist. v. Pulitzer Publishing Co., 898 F.2d 1371 (8th Cir. 1990). A student brought a loaded handgun to school and the IEP team decided that the gun incidents were not related to the student's handicap. The school district obtained a temporary restraining order which prevented the student from returning to the class. The legal issues before the court were the student's privacy rights and the right of the press to attend trial proceedings.

Board of Educ. of Peoria v. Illinois State Bd. of Educ., 531 F. Supp. 148 (C.D. Ill. 1982). In this case, the board of education sought judicial review of an administrative order reversing the decision of an impartial hearing officer which had upheld a five-day suspension of an LD child who had verbally abused his instructor. In upholding the action of the board, the court ruled that a change of placement had not taken place and that "[a]ny theory that some harm of the brief interruption of classroom work could outweigh the educational value of the suspension here can only be recognized as pure imagination, or a feeble attempt at rationalization of a preconceived notion that handicapped students, whatever the degree of handicap, are free of classroom discipline. That is not the law."

Reineman v. Valley View Community Sch. Dist. # 365-U, 527 F. Supp. 661 (N.D. Ill. 1981). The court found that a ***Goss*** hearing was appropriate where a handicapped child was suspended for bringing a knife to school. The student had received numerous in-school and out-of-school suspensions prior to this time.

Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328 (W.D.N.Y. 1979). The plaintiff is legally blind and deaf and suffers from brain damage and an emotional disorder that makes her self-abusive. She was suspended from school due to acts that were handicap related. The court ruled that the emergency suspension was not a change of placement and therefore did not violate her statutory rights; however, when the "indefinite suspension" in reality became an expulsion, a change of placement had occurred. Because an appropriate hearing had not been provided, the court ruled on behalf of the plaintiff.

Mrs. A.J. v. Special Sch. Dist. No. 1, 478 F. Supp. 418 (D. Minn. 1979). The student was in the process of being evaluated to determine the causes of her academic deficiencies, but no determination had been made as to whether she was handicapped. As a result, she was not protected by federal law which ensures due process for handicapped students. The student had been given three successive five-day suspensions, consistent with state law, but was not given a hearing prior to each successive suspension. Such a practice violated state law resulting in a decision for the plaintiff.

Goss v. Lopez, 419 U.S. 565 (1975). The Supreme Court ruled that for a suspension of ten days or less due process requires that the student be given oral or written notice of the charges, an explanation of the evidence, and an opportunity to present his version. Generally, notice and hearing should precede the student's removal from school. But, if prior notice and a hearing are not feasible, as where the student's presence endangers persons or property or threatens disruption of the academic process, the necessary notice and hearing should follow as soon as practicable.

Expulsion

Hacienda La Puente Sch. Dist. of Los Angeles v. Honig, 976 F.2d 487 (9th Cir. 1992). A student who had not been determined to qualify as a person with a disability under IDEA was expelled from school without following section 1415 procedures and the parents filed suit. The circuit court ruled that the student's rights had been violated when the school failed to classify him as disabled, and when there was no determination whether his behavior was disability related or whether he was receiving an appropriate education at the time of his expulsion. To rule otherwise, the court held, would allow districts simply to fail to identify qualifying students so that appropriate programs and due process (section 1415) would not have to be provided.

Metropolitan Sch. Dist. of Wayne Township v. Davila, 770 F. Supp. 1331 (S.D. Ind. 1991), *rev'd and remanded*, 969 F.2d 485 (7th Cir. 1992). The EHLR made public a letter by Assistant Secretary of the Office of Special Education and Rehabilitative Services, Robert Davila, regarding services for suspended and expelled handicapped students. This letter suggested that districts should provide educational services for those students who were suspended or expelled for reasons unrelated to their handicap. The district court found that this interpretation had no basis in either legislative or case law, and enjoined Davila from taking further action to support this position. On appeal, the circuit court reversed and held that the rule was interpretive, rather than legislative, and therefore exempt from notice and comment procedures of the Administrative Procedure Act.

In re* Thomas W.**, 560 N.Y.S.2d 227 (Fam. Ct. 1989). The family court maintained jurisdiction over the truancy proceedings against educationally handicapped children, despite the ***Honig v. Doe requirement that students receive a hearing before their expulsion.

Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), *aff'd sub nom.*, **Honig v. Doe**, 108 S. Ct. 592 (1988). The court of appeals ruled that the EHA prohibits the expulsion of handicapped students for misbehavior that is a manifestation of their handicap. Where handicapped students are properly expelled, the district need not provide instruction of any type during the expulsion period. Furthermore, the court held that a handicapped child is subject to suspension during the pendency of expulsion proceedings, but that the student's program may not be reduced without an appropriate change of placement hearing. On appeal, the Supreme Court reversed in part and concluded that suspensions may not last beyond ten days unless a formal change of placement hearing is conducted, while the state must provide educational services to handicapped children if the local district refuses. Notwithstanding the above, if a student represents a danger to himself or to others and he already has received ten days suspension, school officials must then seek a court order to exclude the child from school while an appropriate placement is being determined.

Doe v. Rockingham County Sch. Bd., 658 F. Supp. 403 (W.D. Va. 1987). This case was brought by a student who had engaged in verbal and physical temper tantrums which included kicking and scratching teachers and hitting other students. He had been disruptive and violent on numerous occasions and eventually was suspended from school. Eleven days following his suspension, the child was examined by a psychologist who determined that he was LD. The child was then formally tested to support the psychologist's opinion. Notwithstanding these findings, the child remained out of school over one month and did not receive a proper hearing. The court ruled that the student's due process rights had been violated and that proper notice of his rights had not been provided.

Board of Trustees of the Pascagoula Mun. Separate Sch. Dist. v. Doe, 508 So. 2d 1081 (Miss. 1987). The district appealed the decision of a hearing officer and the state review team that did not allow the expulsion of a handicapped student who had two knives and six marijuana cigarettes in his possession. A homebound teacher had been offered to the student during the expulsion period. The hearing officer concluded that expulsion was possible only when the child's behavior represents an immediate physical danger, but felt that the plaintiff did not represent such a danger. Furthermore, he concluded that the issue was moot since the child already had graduated. The state review team upheld the hearing officer's decision. The court disagreed and concluded that the case was not moot, given that the issues involved were capable of repetition, and that expulsion under the EHA is possible, but that the behavior cannot be handicap related.

Alexopulos v. Riles, 784 F.2d 1408 (9th Cir. 1986). In this case, a severely retarded adult and his mother brought suit claiming that his exclusion from public education prior to 1973 violated his right to equal protection and due process. Plaintiffs were seeking retroactive application of the EHA and the RA to remedy the alleged constitutional violations. The district court entered summary judgment in favor of the defendants and plaintiffs appealed. The circuit court ruled that: (1) the pre-1973 denial of public education to the plaintiff did not constitute a denial of his rights to equal protection; (2) the procedural due process claim was barred by the statute of limitations; and (3) federal statute would not be applied retroactively to provide the plaintiff with five additional years of education to compensate for the pre-1973 denial of educational services.

Jackson v. Franklin County Sch. Bd., 606 F. Supp. 152 (S.D. Miss. 1985), *aff'd*, 765 F.2d 535 (5th Cir. 1985). The plaintiff is an LD student who unbuttoned the blouse of a female student and touched her breasts. For this act he was suspended for three days. Earlier he had been guilty of sexual misconduct with a three-year-old girl. A youth court committed him to a state hospital for psychiatric evaluation and treatment. The plaintiff sought readmission to school the following fall. The school district refused to admit him until an appropriate program could be prepared. The plaintiff rejected all proposed plans, because they did not include placement in a public school. During the appeals process the student argued that he had the right to remain in his former mainstream placement. The circuit court disagreed, however, and concluded that school officials are not required to continue the placement of children who are likely to be either disruptive or dangerous if they remain in their current placements.

A second Fifth Circuit Court of Appeals case with these two parties was decided in December 1986 (***Jackson v. Franklin County Sch. Bd.***, 806 F.2d 623 (5th Cir. 1986)) because the plaintiff still was not in school, and had not been given a hearing regarding his continued exclusion. As a result, the court identified both an EHA and a Fourteenth Amendment violation. However, the court remanded the case for the trial court to determine (1) the extent of the child's educational loss that was caused by the defendants, as compared to that caused by his mother's "abstinence," and (2) appropriate damages. The court recommended remedial services rather than a monetary award, if anything beyond nominal damages was found to be appropriate.

School Bd. v. Malone, 762 F.2d 1210 (4th Cir. 1985). Jerry Malone, the plaintiff, is an LD student who was expelled from school for his involvement in distributing drugs. The placement committee had ruled that there was no causal relationship between the plaintiff's handicapping condition and his distribution of drugs. The impartial hearing officer reversed the decision of the committee, and that ruling was upheld by the state review official, district court, and circuit court. The district court had concluded, and the circuit court did not find it to be clearly erroneous, that "[a] direct result of Jerry's learning disability is a loss of self image, an awareness of lack of peer approval occasioned by ridicule or teasing from his chronological age group. He can't keep pace with these peers. He is ostracized from their group. He doesn't understand their language. These emotional disturbances make him particularly susceptible to peer pressure. Under these circumstances he leaps at a chance for peer approval. He is a ready 'stooge' to be set up by peers engaged in drug trafficking."

Lamont X. v. Quisenberry, 606 F. Supp. 809 (S.D. Ohio 1984). Del and Lamont, the plaintiffs, are severely behaviorally handicapped and were removed from the classroom for separate involvements of violent and disruptive behavior. While at home, the children were provided with tutoring. The expulsions lasted well beyond the ten-day mark, and were ruled to have been a change of placement. The court agreed with the district that it may temporarily suspend disruptive and violent children through use of its normal administrative machinery, but that in the present case the assignment of the children to a prolonged home program did not qualify as "normal." No section 1415 hearing had been provided prior to the expulsions. Accordingly, the court ruled on behalf of the plaintiffs.

Adams Cent. Sch. Dist. No. 090, Adams County v. Deist, 334 N.W.2d 775 (Neb. 1983), *modified*, 338 N.W.2d 591 (Neb. 1983). The plaintiff, a handicapped child who exhibited destructive and disruptive behavior, was suspended from school and told he could not return until his behavior changed. The court found the action to represent an expulsion, which should have required a section 1415 hearing. The court ruled that local school officials are prohibited from expelling students whose handicaps cause them to be disruptive and concluded that educators may only transfer disruptive pupils to more appropriate and restrictive environments. The court modified the decision to reflect the definition on "appropriate education" outlined in ***Rowley***.

Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982). Michael Kaelin, the plaintiff, is educable mentally handicapped. He refused to complete assigned work, destroyed a work sheet and coffee cup, and pushed and kicked his teacher. As a result, he was expelled from school, but did not receive a hearing consistent with section 1415. The court ruled that expulsion was a change of placement and that the plaintiff had not been provided with adequate due process. The court noted that a handicapped child may be expelled only if his disruptive behavior is shown not to be a manifestation of his handicap and that even if the expulsion had been justified there could not be a complete cessation of services. The court also observed, however, that school officials may control violent or antisocial behavior through the use of suspensions, if a ***Goss*** hearing is provided. Temporary removal of the child (fewer than ten days) did not constitute a change of placement and therefore did not require a section 1415 hearing.

S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981). Eight handicapped children were expelled for a variety of violations. No effort was made to determine if the acts were handicap related, and no change of placement hearing was provided, although expulsion was ruled to be a change of placement. Because handicap relatedness had not been demonstrated, the court ruled that the expulsions were inappropriate. The court also noted that "knowing right from wrong" is not the standard, and that although expulsion is theoretically possible under federal law, assuming proper due process, a complete cessation of services would not be permitted.

H.R. v. Hornbeck, 524 F. Supp. 215 (D. Md. 1981). The court ruled that the plaintiffs were responsible for exhausting administrative remedies prior to bringing an action under the EHA, the RA, or the Fourteenth Amendment which attacked the exclusion of handicapped children from educational services.

Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979). The plaintiff was a mildly mentally handicapped student who was expelled from school due to his disruptive behavior. While the court ruled that districts may transfer disruptive students to appropriate more restricted environments, it may not expel students whose handicaps caused them to be disruptive.

Southeast Warren Community Sch. Dist. v. Department of Pub. Instruction, 285 N.W.2d 173 (Iowa 1979). The Supreme Court of Iowa ruled that the district erred when it expelled a student without first reevaluating him to determine the appropriateness of an alternative placement. The court noted that expulsion should be the final resort, used only when no reasonable alternative placement is available. In the present case, the district should not have expelled the student through use of its regular procedures.

Howard S. v. Friendswood Indep. Sch. Dist., 454 F. Supp. 634 (S.D. Tex. 1978). The plaintiff had minimal brain damage, a definite learning disability and, at least temporarily, severe emotional disturbance. Following a suicide attempt, he was hospitalized. While recuperating, he was "officially dropped" from school. No hearing regarding the expulsion was provided, while the procedures used to drop him were those typically employed when a child moves from the district. The court ruled on behalf of the plaintiff and concluded that the district had violated the RA as well as the Constitution.

Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978). The plaintiff, a student with deficient academic skills caused by a complex of learning disabilities and limited intelligence, was suspended and later recommended for expulsion due to her involvement in a school-wide disturbance. The court ruled that educators may take swift disciplinary measures, such as suspension, against disruptive handicapped children, or may seek a change of placement to a more restrictive environment. However, the court went on to conclude that expulsion is not possible and that it "flies in the face of the explicit mandate of the Handicapped Act. . . ."

Transfer

Weil v. Board of Elementary and Secondary Educ., 931 F.2d 1069 (5th Cir. 1991). Where the child's transfer to a less innovative but similar program was due to the closing of the present facility, the district was not required to provide notice of the change in educational placement. The court reasoned that even if notice were provided and the parents requested a hearing, nothing substantial could have resulted.

Texas City Indep. Sch. Dist. v. Jorstad, 752 F. Supp. 231 (S.D. Tex. 1990). The court granted a preliminary injunction to prevent a student from attending mainstream classes as specified in his IEP. The student became increasingly disruptive as the year progressed, jumped from the second floor windows on several occasions, darted into a nearby roadway, and caused considerable damage to the time-out room. The student was temporarily limited to attending the behavioral management class or to receiving in-home care.

Victoria L. *ex rel.* Carol A. v. District Sch. Bd., 741 F.2d 369 (11th Cir. 1984). A student with a special learning disability challenged her involuntary transfer from high school to an alternative learning center as violative of the EHA. She was viewed as potentially dangerous and on one occasion carried a razor blade and a martial acts weapon to school and threatened to injure or kill another student. The court ruled on behalf of the district, given that the child's continued presence in the school represented a danger to others. (No evidence was presented as to the appropriateness of the proposed placement.)

Concerned Parents and Citizens for the Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ., 629 F.2d 751 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). This case dealt with the need to transfer based on "school closing," rather than behavior. The court ruled that to transfer a child from one school to another, when the newly assigned school provides substantially similar classes, is not a change of placement necessitating an appropriate hearing.

Disciplinary Program Incorporated into IEP

Pratt v. Board of Educ. of Frederick County, 501 F. Supp. 232 (D. Md. 1980). The parents requested an "individualized disciplinary program" for their emotionally disturbed child in addition to an IEP. The court rejected this idea, but ordered the creation of a new educational plan that would better meet the child's needs.

Relief Under IDEA

Reimbursement for Private Services & the Stay-put Provision

Sherri A.D. v. Kirby, 975 F.2d 193 (5th Cir. 1992). The circuit court held that the magistrate did not violate the EAHCA stay-put provision when he transferred a twenty-year-old blind, deaf, and mentally retarded women from a residential school for handicapped persons to a community residence where she would receive educational services from the local school district.

Babb v. Knox County Sch. Sys., 965 F.2d 104 (6th Cir. 1992). The appeals court ordered the school system to reimburse the parents of a severely emotionally disturbed child for costs incurred in enrolling their child in a private, residential facility, including expenses for psychological and counseling services. The district court had ruled for the defendant and reasoned that the plaintiffs had failed to exhaust administrative remedies. The circuit court reversed that decision.

Angevine v. Smith, 959 F.2d 292 (D.C. Cir. 1992). The circuit court reversed the district court decision which had ordered the reimbursement of expenses incurred by the parents of a child with a disability. The appeals court reasoned that the lower court had not justified its rejection of the hearing officer's determination that the public school placement was appropriate.

Kroot v. District of Columbia, 800 F. Supp. 976 (D.D.C. 1992). The parents sought reimbursement for costs incurred in sending their child to a private school for LD children. The motions for summary judgment were denied and the case was remanded for a new administrative hearing. During the original hearing, the hearing officer improperly shifted the burden of proving that the child was eligible for special education from the district to the parents.

Dreher v. Amphitheater Unified Sch. Dist., 797 F. Supp. 753 (D. Ariz. 1992). The parents of a deaf child were denied reimbursement for speech therapy services provided to their child at a private out-of-state school. The district had offerred an appropriate public placement, but the parents, nevertheless, elected to enroll their child in the private school.

McClain v. Smith, 793 F. Supp. 756 (E.D. Tenn. 1989). The district court held that although the assignment of a severely retarded eighteen-year-old woman to a group home for adults was arguably a mistake it nevertheless qualified as an educational placement under the EAHCA and that a motion for a "stay put" order was timely since the home had notified the parents that it intended to discharge the woman. Furthermore, the court held that administrative remedies had been exhausted, notwithstanding the fact that the administrative law judge had not yet issued a written option. A bench ruling had been made, while all parties had relied upon the oral findings made at the administrative proceedings.

P.J. *ex rel.* W.J. v. Connecticut Bd. of Educ., 788 F. Supp. 673 (D. Conn. 1992). The court held that the district had failed to properly evaluate the plaintiff, that a written IEP must be prepared, and that if a placement that was not fully integrated was selected, the district must justify its decision. The parents also had requested that they receive reimbursement for their out-of-pocket expenses incurred over a two-year period. The court denied the request and reasoned that although the existing IEP may not have been provided in the LRE, the parentally-selected private program was inappropriate as well (i.e., neither was staffed with trained professionals needed to provide speech and language therapy or physical and occupational therapy, while classroom teachers were not certified in special education). Accordingly, reimbursement under ***Burlington*** was not required.

Northeast Cent. Sch. Dist. v. Sobol, 584 N.Y.S.2d 525 (Ct. App. 1992). In this case based on state law, a school district challenged a decision of the state Commissioner of Education ordering it to reimburse parents of an LD child for tuition and transportation costs incurred in enrolling him in another district. The court upheld the decision of the Commissioner requiring reimbursement and ordered the payment of attorney fees.

Carter v. Florence County Sch. Dist., 950 F.2d 156 (4th Cir. 1991). Following the unilateral removal of their LD child from an allegedly inappropriate public placement, the parents enrolled her in a private school and sought reimbursement. The circuit court held for the parents and required the district to provide reimbursement, notwithstanding the fact that the parentally selected private placement was not on the state's approved list.

Board of Educ. of Community Consol. Sch. Dist. No [illegible] Cook County, Ill. v. Illinois State Bd. of Educ., 938 F.2d 712 (7th Cir. 1991). The parents removed their fifteen-year-old child from his public school placement and placed him in a private school. The initial dispute was over the child's primary diagnosis: the district proposed a placement considering a primary diagnosis of behavior disorder while the parentally chosen placement was based on a primary diagnosis of learning disability.

After independent evaluators concurred that the child was primarily emotionally disturbed, it was, nevertheless, ruled that the district proposed placement was no longer appropriate because the parents had "poisoned" that option in the mind of their son. Ruling that parental hostility could be considered when determining the appropriate placement for the student, the court ordered the district to fund a private school placement and to pay attorney fees.

Jenkins *ex rel.* Jenkins v. Florida, 815 F.2d 629 (11th Cir. 1987), *appeal after remand*, 931 F.2d 1469 (11th Cir. 1991). Parents of an LD child brought this action seeking injunctive relief and reimbursement for expenditures for private special education. The district court granted the injunctive relief, but denied the claim for reimbursement. The appeals court held that the lower court had used the incorrect standard and should now follow precedent established in ***Burlington***. On appeal after remand, the court ruled that the doctrine of *res judicata* prevented further consideration of the scope of class action claims decided by the original district court.

Weil v. Board of Elementary and Secondary Educ., 931 F.2d 1069 (5th Cir. 1991). Where the child's transfer to a less innovative but similar program was due to the closing of the present facility, the district was not required to provide notice of the change in educational placement. The court reasoned that even if notice were provided and the parents requested a hearing, nothing substantial could have resulted.

Livingston v. DeSoto County Sch. Dist., 782 F. Supp. 1173 (N.D. Miss 1992). Parents of an LD child were not entitled to reimbursement for their private school costs given that an appropriate public program had been made available by the school district.

Straube v. Florida Union Free Sch. Dist., 778 F. Supp. 774 (S.D.N.Y. 1991). The parents of an LD child (dyslexia and attention deficit disorder) challenged the district IEP and sought enrollment in a private school. The private school was not on the state approved list; in fact, no school with the ability to meet the plaintiff's educational needs was included. In ruling on a number of related issues, the court held that (1) the Eleventh Amendment did not bar the present action; (2) exhaustion of administrative appeals was unnecessary since continuation would have been futile (i.e., the hearing officer was not empowered to assign a student to a school that did not have state approval); and (3) although the court could not order either placement or reimbursement for an unapproved school, there was sufficient evidence to deny defendant's motion to dismiss in that the state had not provided plaintiff with a FAPE.

Joshua B. v. New Trier High Sch. Dist. 203, 770 F. Supp. 431 (N.D. Ill. 1991). The stay-put provision was intended to protect the educational placement of students currently receiving services under the EHA, and not to prevent students who have not yet been placed by the state from receiving appropriate services during the pendency of review prior to initial placement.

Norton Sch. Comm. v. Massachusetts Dep't of Educ., 768 F. Supp. 900 (D. Mass. 1991). The court found that the parentally selected residential placement was appropriate and that the district placement was inappropriate. The district was required to reimburse the parents for related costs.

Ash v. Lake Oswego Sch. Dist. No. 7J, 766 F. Supp. 852 (D. Org. 1991). The court found residential placement to be appropriate for the autistic student who was unable to generalize from one learning environment to another and who needed instruction in basic living skills such as toileting, dressing, and eating. Reimbursement for parental expenses incurred prior to requesting an IEP were denied, however.

Logsdon *ex rel.* Logsdon v. Board of Educ. of Pavilion Cent. Sch. Dist., 765 F. Supp. 66 (W.D.N.Y. 1991). The court held that the "stay-put" provision did not require the school district to place a five-year-old child with Down's Syndrome in a regular kindergarten class, where the proffered special education class allowed the child to receive some educational programming during the pendency of the dispute.

Shirk v. District of Columbia, 756 F. Supp. 31 (D.D.C. 1991). Subsequent to the district's failure to find an appropriate placement, the parents of a five-year-old LD child unilaterally placed their daughter in a private school. During the course of the year, this school was "decertified," resulting in the district's refusal to reimburse the parents for previous payments. The court ruled for the parents and required the district to pay related costs.

Fagan v. District of Columbia, 136 F.R.D. 9 (D.D.C. 1991). The court found that the parents of a sixteen-year-old seriously emotionally disturbed child could seek reimbursement through the courts for private school tuition. The parents rejected the district proposed IEP and placed their son in the private school during the pendency of their challenge to the IEP.

Northeast Cent. Sch. Dist. v. Sobol, 572 N.Y.S.2d 752 (App. Div. 1991). Displeased with their child's progress in the program provided by their district of residence, the parents unilaterally placed their handicapped child in a special education program in a public school in a nearby district. Basing its reasoning on ***Burlington***, the court ruled at under New York Law, the Commissioner of Education had the authority to require reimbursement to the parents for related educational and transportation costs.

Rapid City Sch. Dist. 51-4 v. Vahle, 733 F. Supp. 1364 (D.S.D. 1990), *aff'd*, 922 F.2d 476 (8th Cir. 1990). A school district was required to reimburse the parents of a handicapped child for occupational therapy they acquired for their child. The reimbursement was considered proper, because the hearing examiner had determined that the private placement, rather than the proposed IEP, was appropriate. The child had been regressing while participating in the public placement.

Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990). A child's IEP was upheld as appropriate by a district court. That position was affirmed by the circuit court which further reasoned that the parents should not be reimbursed for the costs of the unilateral placement of their child in a private residential school. The court noted that the lower court did not abuse its discretion in precluding the testimony of parents' expert witnesses where the testimony was deliberately withheld at the administrative level.

Tice *ex rel.* Tice v. Botetourt County Sch. Bd., 908 F.2d 1200 (4th Cir. 1990). The Fourth Circuit held that the parents of a handicapped child should be reimbursed for educational expenses incurred during a delay by the local school district in providing their child with an appropriate IEP, if the selected placement was found to be appropriate. However, because the IEP eventually proposed by the district was appropriate, and signed by the mother, the parents were not entitled to reimbursement following the adoption of the IEP. Furthermore, the parents were not entitled to recover for medical services provided to their child following a nervous breakdown.

Doe *ex rel.* Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990). The court refused to require the school district to reimburse the parents of an LD child for the cost of private tutoring. The parents had refused the services of a public tutor.

Block v. District of Columbia, 748 F. Supp. 891 (D.D.C. 1990). The school district had failed to provide a handicapped child with an appropriate program. As a result, the mother removed the child from the public placement and placed him in a private school which could meet his needs. The court later concluded that the mother's actions were justified and that she was entitled to reimbursement.

Matta *ex rel.* Matta v. Board of Educ.—Indian Hill Exempted Village Schs., 731 F. Supp. 253 (S.D. Ohio 1990). The court held that the local residential placement identified in the child's IEP (severely multi-handicapped) was appropriate and that the foreign school (Higashi School in Japan) in which the parents placed the child was not appropriate. As a result, the school district was not required to reimburse the parents for tuition expenses.

Briggs v. Board of Educ. of Conn., 882 F.2d 688 (2d Cir. 1989). Parents of a child with moderate-to-severe sensorineural hearing loss and mild-to-moderate speech and language delays filed suit seeking reimbursement for costs of a private placement. The court gave proper deference to the agency experts and hearing officer and thereby upheld the finding that the proposed IEP was appropriate and that the parents were not entitled to reimbursement.

Knight v. District of Columbia, 691 F. Supp. 1567 (D.D.C. 1988), *rev'd*, 877 F.2d 1025 (D.C. Cir. 1989). Reimbursement was sought for costs of a private placement of a child who suffered from severe emotional, physical, and intellectual handicaps. The circuit court held that the public placement was not inherently dissimilar to the private placement and that the public placement was designed to provide the child with some educational benefit. As a result, the parent was not entitled to reimbursement.

Andersen *ex rel.* Andersen v. District of Columbia, 877 F.2d 1018 (D.C. Cir. 1989). Learning disabled children were placed in a private school following the rejection of their proposed public placements. The parents then filed suit to hold the district responsible for related education costs. The district court had ruled that the education placements offered by the district were appropriate and therefore did not require the district to reimburse the parents. That decision was upheld on appeal to the D.C. Circuit.

Drew P. v. Clarke County Sch. Dist., 676 F. Supp. 1559 (M.D. Ga. 1987), *aff'd*, 877 F.2d 927 (11th Cir. 1989). The school district refused a residential placement (Tokyo and Boston) for an autistic child and the Georgia parents brought suit. The district court required the school system to provide the appropriate residential placement until age twenty-one (unless future IEPs indicated that such a placement was unnecessary) and ordered reimbursement for prior appropriate educational expenses and attorney fees. That decision was upheld by the circuit court.

Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563 (2d Cir. 1989). The court held that the district need not reimburse parents for unilateral placement of their child in a school that was not on the approved list of schools eligible to contract for the education of handicapped children. To be included on "the list" a school had to meet state standards.

Gillette *ex rel.* Gillette v. Fairland Bd. of Educ., 725 F. Supp. 343 (S.D. Ohio 1989) *rev'd*, 932 F.2d 551 (6th Cir. 1991). This case involved claims that the local district had failed to provide a dyslexic child with a FAPE and that the parents were thus entitled to reimbursement for the costs they incurred in enrolling him in a private school. The district court held that the parents were not entitled to reimbursement for the seventh and eighth grades because they had failed to request a hearing prior to enrolling him in the private program, and because his sixth grade program was reasonably calculated to enable him to receive educational benefit. However, the court then ruled that the district failed to provide the plaintiff's child with a FAPE during his tenth grade year because it failed to meet the LRE requirement. As a result, reimbursement for expenses incurred during the tenth, eleventh, and twelfth grade years was appropriate—tuition, room, and board.

Bertolucci v. San Carlos Elementary Sch. Dist., 721 F. Supp. 1150 (N.D. Cal 1989). The court held that the district had been providing a dyslexic child with a FAPE, and that reimbursement of private school costs was unwarranted.

Barnett v. Fairfax County Sch. Bd., 721 F. Supp. 755 (E.D. Va. 1989). This case included claims under the EHA, section 504, and section 1983. The court held that although reimbursement for private tuition was recoverable under the EHA, compensatory damages were not; that damages, absent bad faith or intentional discrimination, could not be sought under section 504; and that in the present case a section 1983 claim could not be predicated solely upon an alleged violation of the EHA and section 504.

Carrington v. Commissioner of Educ., 535 N.E.2d 212 (Mass. 1989). Parents sought reimbursement for out-of-state private school costs incurred during a dispute over their child's IEP. The district had denied reimbursement in part due to the school not being on the state-approved list. The court determined that the district must reimburse the parents for their private school costs, given that the proposed IEP was inappropriate.

Lascari v. Board of Educ. of Ramapo Indian Hills Regional High Sch. Dist., 560 A.2d 1180 (N.J. 1989). The court awarded the parents of a neurologically and conceptually impaired child reimbursement for tuition, but not for residential expenses, since residential placement was not the LRE.

***In re* Savio**, 537 N.Y.S.2d 262 (App. Div. 1989). The court allowed the parents to file for reimbursement of expenses they incurred in providing their child with special education services during the summer months, notwithstanding the fact that the court encouraged the parents to file before the services were rendered.

Jefferson County Bd. of Educ. v. Breen, 694 F. Supp. 1539 (N.D. Ala. 1987), *aff'd*, 853 F.2d 853 (11th Cir. 1988). The plaintiff, who sustained physical and mental impairments resulting from an automobile accident, requested reimbursement for out-of-pocket expenses associated with a unilaterally attained private placement. The court found the district proposed placement was inappropriate and ordered reimbursement as well as two years compensatory education to compensate for time the child spent in an inappropriate placement.

Antkowiak *ex rel.* Antkowiak v. Ambach, 653 F. Supp. 1405 (W.D.N.Y. 1987), *rev'd and remanded*, 838 F.2d 635 (2d Cir. 1988), *cert. denied*, **Doe *ex rel.* Doe v. Sobol**, 109 S. Ct. 133 (1988). There was no dispute that the child was appropriately placed in a residential facility. However, the facility had been removed from the state approved list, notwithstanding the fact that it was the only one of its type available. Given the lack of an acceptable alternative, the father moved to have the placement decision enforced by the courts. The lower court supported the plaintiff's claim; however, that decision was overturned on appeal, where the circuit court found that the district court was not authorized to order a placement which was in violation of state educational standards.

Hiller *ex rel.* Hiller v. Board of Educ. of Brunswick Cent. Sch. Dist., 687 F. Supp. 735 (N.D.N.Y. 1988). The parents were denied tuition reimbursement after unilaterally moving their son to a school which was not on the state approved list.

Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988). The school district was required to pay for the private education of a handicapped child where this was found to be appropriate.

Thornock v. Boise Indep. Sch. Dist. No. 1, 767 P.2d 1241 (Idaho 1988). Where the district failed to provide an adequate IEP in the LRE, the parents were granted reimbursement for both tuition to a parochial school and the cost of a full time aide.

Hudson *ex rel.* Tyree v. Wilson, 828 F.2d 1059 (4th Cir. 1987). After the results of a privately attained evaluation were disregarded by the school district, the parents of an emotionally disturbed and LD child moved him from the public placement into a private facility. The court ruled that the unilateral transfer did not prevent the parents from receiving reimbursement from the placement which was determined to be appropriate. The parents were also reimbursed for the private evaluation of their son, but not for additional, corroborating tests.

Schimmel *ex rel.* Schimmel v. Spillane, 630 F. Supp. 159 (E.D. Va. 1986) *aff'd*, 819 F.2d 477 (4th Cir. 1987). The parents alleged that the district had denied their handicapped child a FAPE and requested an out-of-state placement as well as reimbursement. The court ruled that the EHA did not require the district to place the boy in an out-of-state, unapproved, private school. Both placement and reimbursement were denied.

Gregory K. v. Longview Sch. Dist., 811 F.2d 1307 (9th Cir. 1987). Among other issues, this case dealt with a parental request for reimbursement for tutoring costs. The child was receiving tutoring within his IEP. However, the tutor resigned and a second tutor was assigned. The parents alleged that the change of tutors constituted a change of placement in violation of the status quo provision and that the new tutor was not qualified. The parents then requested a hearing and removed their child from school for three hours each day to be tutored privately by the former tutor. The parents paid for this service and requested reimbursement. The district denied the request. The court ruled that there was no right to tutoring by a particular tutor and that the district need not reimburse the parents.

Hall v. Freeman, 700 F. Supp. 1106 (N.D. Ga. 1987). Residential placement was not required to provide an appropriate education for an emotionally handicapped child, so the court denied reimbursement for the mother's expenditures related to a unilaterally chosen private placement.

Rouse v. Wilson, 675 F. Supp. 1012 (W.D. Va. 1987). The parent was not entitled to reimbursement for privately attained educational services where the district proposed placement for an LD student was appropriate.

Vander Malle v. Ambach, 667 F. Supp. 1015 (S.D.N.Y. 1987). Even where residential placement might have benefitted the child for medical, social, or emotional reasons, the district was required to pay room and board in addition to tuition only if the residential placement was appropriate to meet the child's educational needs.

Cochran v. District of Columbia, 660 F. Supp. 314 (D.D.C. 1987). The school district failed to assign a child to an appropriate educational placement until late in November 1985, and the parents unilaterally placed their child in a private school for LD children. A hearing officer ordered the district to fund the private placement until April 7, 1986, at which time the district ceased payments but failed to propose an alternative placement. The court found the private school to be the child's current placement under the EHA.

Saleh v. District of Columbia, 660 F. Supp. 212 (D.D.C. 1987). By mutual agreement of the school district and the parents, the plaintiff was placed in the private Lab School during the 1985-86 school year. In the summer of 1986 the district proposed a change of placement, which was challenged by the parents. The court found that the private Lab School was the "then current placement," to be maintained at district expense during the pendency of review.

Doe v. Anrig, 651 F. Supp. 424 (D. Mass. 1987). The non-custodial parent was eligible for reimbursement of individual psychotherapy and group therapy.

Hunter *ex rel.* Hunter v. Seattle Sch. Dist. No. 1, 731 P.2d 19 (Wash. Ct. App. 1987). Parents, who unilaterally removed their child to an out-of-state private facility before the school district had the opportunity to evaluate the child and recommend an appropriate placement, were denied tuition reimbursement.

Board of Educ. of East Windsor Regional Sch. Dist. v. Diamond, 808 F.2d 987 (3d Cir. 1986). The school board filed this action seeking an order requiring day placement of a handicapped child and denying the parents of the child reimbursement of costs incurred in the residential placement. The court concluded that residential placement was appropriate for the plaintiff and that the parents were entitled to recover costs.

Gerasimou *ex rel.* Gerasimou v. Ambach, 636 F. Supp. 1504 (E.D.N.Y. 1986). The award of tuition reimbursement was found to be appropriate if the parentally chosen placement provided a FAPE and the district placement did not.

Eugene B. Jr. *ex rel.* Eugene and Kathe B. v. Great Neck Union Free Sch. Dist., 635 F. Supp. 753 (E.D.N.Y. 1986). The parents were reimbursed for tuition to a private school. They were only required to demonstrate that this was the appropriate placement, and not that the district proposed placement was made in bad faith or would have posed physical harm to the child.

Linkous v. Davis, 633 F. Supp. 1109 (W.D. Va. 1986). The parents put themselves at financial risk by unilaterally moving their child to a private placement; however, this did not barr reimbursement if the private placement was later found to be appropriate.

Board of Educ. of City of New York v. Ambach, 628 F. Supp. 972 (E.D.N.Y. 1986). Where the school district failed to offer an appropriate placement within sixty days of referral, the private school placement ordered by the State Commissioner of Education was found to be the current placement. The school district was required to fund this placement during the pendency of review.

Taglianetti *ex rel.* Taglianetti v. Cronin, 493 N.E.2d 29 (Ill. App. Ct. 1986). Parents unilaterally placed their emotionally handicapped child in a private facility which was not approved by the state. The court found that the district had no obligation to reimburse tuition for a placement that it had no authority to provide, even if that placement was found appropriate for the child.

Murphy v. Commonwealth, Dep't of Educ., 460 A.2d 398 (Pa. Commw. Ct. 1983), *aff'd*, 504 A.2d 382 (Pa. Commw. Ct. 1986). A private in-state institution was found to be appropriate, so the parents were denied reimbursement for their expenses at an out-of-state school.

Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985). A student with dyslexia and his parents brought suit seeking reimbursement for education costs incurred by them. The district court ruled that the school district had failed to provide the child with a FAPE and awarded reimbursement. In light of ***Burlington***, the circuit court upheld the trial court opinion.

Town of Burlington v. Department of Educ., Commonwealth of Mass., 655 F.2d 428 (1st Cir. 1981); *on remand*, **Doe v. Anrig**, 561 F. Supp. 121 (D. Mass. 1983), *aff'd in part, rev'd in part*, **Town of Burlington v. Department of Educ., Commonwealth of Mass.**, 736 F.2d 773 (1st Cir. 1984), *aff'd sub nom.*, **Burlington Sch. Comm. of Town of Burlington, Mass. v. Department of Educ.**, 105 S. Ct. 1996 (1985). The father of a child with a learning disability rejected the proposed IEP and, given the results of the latest expert evaluation of the child's needs, instead enrolled him in a private program. The hearing officer ruled that the proposed placement was not appropriate and, as a result, supported the father's action. The district was required to pay current, as well as prior, tuition and transportation costs. After a number of administrative and judicial appeals, the district agreed to pay for current and future expenses, but refused to reimburse the father for prior payments. The federal district court ruled on behalf of the district and the case was appealed. The circuit court ruled that a unilateral change of placement by the parents would not bar reimbursement if their actions were upheld. However, the circuit court suggested that a lack of parental consultation with the district may be taken into account in a district court's computation of an award of equitable reimbursement.

In a unanimous ruling, the Supreme Court concluded that if the private placement ultimately is determined to be appropriate, the parents are not barred from receiving reimbursement. The Court also noted that the withdrawal of the child from the existing placement during an appeal did not constitute a waiver of the parents' right to reimbursement.

McKenzie v. Smith, 771 F.2d 1527 (D.C. Cir. 1985). Parents brought suit claiming that the district violated their child's rights under the EHA. The court ruled that the public school placement was inappropriate and that the child should be placed in the private school selected by the parents. Furthermore, the district was required to reimburse the parents for costs already incurred.

Board of Educ. of City of New York v. Ambach, 612 F. Supp. 230 (E.D.N.Y. 1985). The school district was ordered to reimburse parents for tuition to a private school even where the board recommended placement was later found to be appropriate. The court based its decision on the finding that the "then current placement" was the one prior to and during the review, and not the district preferred placement.

***In re* John K.**, 216 Cal. Rptr. 557 (Ct. App. 1985). Where the school district maintained a handicapped child in a "manifestly inappropriate" placement, failed to reassess, and expelled the student for handicap related behavior, the court found that unilateral transfer to a private facility was justified. The case was remanded for a determination of appropriate reimbursement.

Cain v. Yukon Pub. Schs., Dist. I-27, 556 F. Supp. 605 (W.D. Okla. 1983), *aff'd*, 775 F.2d 15 (10th Cir. 1985). The student had been expelled for violent conduct, in part caused by insufficient attention from the teacher. The district proposed a new IEP for the child, but the parents rejected the plan. The parents then enrolled the child in a private school and requested reimbursement. The court held that the district was not required to reimburse the parents.

School Comm. of Franklin v. Commissioner of Educ., 462 N.E.2d 338 (Mass. App. Ct. 1984), *rev'd and remanded*, 482 N.E.2d 796 (Mass. 1985). Where it had not been proven that an appropriate program could not be developed by the public school district, or that the parentally chosen program was appropriate, the court refused to reimburse the parents for unilaterally transferring their child to a private school. The case was remanded on appeal, as the lower court applied the "substantial evidence" standard of review rather than the "fair preponderance" standard.

Scokin v. Texas, 723 F.2d 432 (5th Cir. 1984). The child's regression was not sufficiently significant as to warrant the parents' unilateral withdrawal of their child from the public school. Reimbursement of private school tuition was denied.

Brynes v. Riles, 204 Cal. Rptr. 100 (Ct. App. 1984). California law allowed the parents to unilaterally move a child to a private placement during the pendency of EHCA procedures.

Doe v. Brookline Sch. Comm., 722 F.2d 910 (1st Cir. 1983). Where the parents unilaterally moved their child to a private placement, the district was required to pay related expenses only if such placement was found to be the appropriate placement. If the parentally chosen placement was determined to be inappropriate, the parents were required to bear the financial burden.

Rowe v. Henry County Sch. Bd., 718 F.2d 115 (4th Cir. 1983). The court ruled that the stay-put provision prevented the parents from unilaterally placing their children in a private school, and by doing so they waived their right to reimbursement.

Marvin H. v. Austin Indep. Sch. Dist., 714 F.2d 1348 (5th Cir. 1983). Claims under section 504 were unfounded where no data could support intentional discrimination. Additionally, where the parents chose to unilaterally remove their child to private school, there was no claim under EHA.

Tilton *ex rel.* Richards v. Jefferson County Bd. of Educ., 705 F.2d 800 (6th Cir. 1983). A state operated day treatment facility that operated year round was closed for financial reasons. The court held that the stay-put provision did not apply when a facility closes. In the instant case, however, replacing the year-round program with one that operated 180 days was viewed as a change of placement which required appropriate due process.

Mark R. v. Board of Educ., Bremen Community High Sch. Dist. No. 228, 546 F. Supp. 1027 (N.D. Ill. 1982), *aff'd mem.*, 705 F.2d 462 (7th Cir. 1983). The parents unilaterally moved their child with severe behavioral disorders from a private psychiatric hospital to a private residential facility protesting that the district proposed placement, a day program, would endanger the child's health. There was no allegation that the psychiatric hospital, the current educational placement, was detrimental to the child's health, so the parents were not entitled to reimbursement for the unilateral move.

Stacey G. *ex rel.* William G. v. Pasadena Indep. Sch. Dist., 695 F.2d 949 (5th Cir. 1983). The status quo provision of the EHA required that "[t]hroughout the hearings and appeals process, the public agency is responsible for maintaining the student in the present placement. . . ." This could not be construed to mean, however, that the school district was required to pay costs of a parentally chosen placement during the pendency of review where this was not found to be the appropriate placement.

William S. v. Gill, 572 F. Supp. 509 (N.D. Ill. 1983). Reimbursement for residential services for a child who suffered from severe multiple handicaps was denied. The court found that the existence of only two circumstances would permit reimbursement: (1) where the child's physical health would have been endangered, or (2) where the defendant acted in bad faith by failing to comply with procedural provisions in an "egregious fashion." Neither circumstance was proven in the present case.

Jacobsen v. District of Columbia Bd. of Educ., 564 F. Supp. 166 (D.D.C. 1983). The defending school district agreed to pay tuition to the private school where the parents unilaterally enrolled their child prior to commencement of the trial. Since there was no time limitation set on this agreement, the court found that it must continue even where the hearing process entered a second year.

Wiley House v. Scanlon, 432 A.2d 324 (Pa. Commw. Ct. 1980), *aff'd*, 465 A.2d 995 (Pa. 1983). The secretary of education was found to have the authority to certify which private schools were eligible to receive state payments for providing special education services.

Lillian S. v. Ambach, 461 N.Y.S.2d 501 (App. Div. 1983). The family court found that a private residential school was the appropriate placement for a handicapped child. The parents had unilaterally transferred their son to a "comparable" school and requested tuition reimbursement. The court was not persuaded that the parentally selected placement should be considered the "then current" placement, and denied reimbursement.

Teplitz v. Mount Prospect Elementary Sch. Dist. No. 57, 453 N.E.2d 871 (Ill. App. Ct. 1983). Parents who failed to show that their child's health was jeopardized by the public school placement were denied reimbursement for private services unilaterally attained.

Zvi D. *ex rel.* Shirley D. v. Ambach, 520 F. Supp. 196 (E.D.N.Y. 1981), *aff'd*, 694 F.2d 904 (2d Cir. 1982). A child who was diagnosed with minimal brain dysfunction was transferred to a public school from a private residential placement. The court ruled that, due to the long list of students awaiting placement in special education classes, transfers were possible while hearings challenging such transfers continued, and the parents failed to prove that the private placement was the current placement within the status quo provision.

Vander Malle v. Ambach, 673 F.2d 49 (2d Cir. 1982). The state was required to maintain a twenty-year-old handicapped student at an institution that had been removed from the state approved list while a satisfactory replacement was found.

Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982). The court found a clear obligation to pay tuition for a child who was enrolled in a private school where there had not been proper review prior to placement.

Flavin v. Connecticut State Bd. of Educ., 553 F. Supp. 827 (D. Conn. 1982). The parents were denied reimbursement for private school tuition. The court found that reimbursement was proper only where the district acted in bad faith or the child's health was endangered.

Gregg B. v. Board of Educ. of Lawrence Sch. Dist., 535 F. Supp. 1333 (E.D.N.Y. 1982). In April 1979, the parents of a handicapped child enrolled him in a private school, which was approved as the appropriate placement by the local Committee for the Handicapped in June of that year. Notwithstanding, in August, the parents received notice from the Committee attorney that the placement was not on the state approved list; however the letter made no reference to an alternative placement for the coming school year, nor did it indicate that reimbursement for the placement would be denied. The parents re-enrolled their child based on the committee's recommendation that this was the appropriate placement, and filed for reimbursement. The court ruled that, despite state law denying reimbursement for attendance at nonapproved schools, the parents could not be responsible to pursue administrative remedies where they had no adverse decision to question.

Blomstrom v. Massachusetts Dep't of Educ., 532 F. Supp. 707 (D. Mass. 1982). Where the school district made an inappropriate placement of a handicapped child, and the mother unilaterally moved the child to a private residential placement, the court found partial reimbursement to be appropriate. The court concluded that, while the district had an obligation to reimburse the cost of the appropriate day program for the child, it had no obligation to pay for a residential placement since this was unnecessary to provide an adequate program.

Commonwealth v. School Comm. of Blackstone Valley Vocational Regional Sch. Dist., 432 N.E.2d 726 (Mass. App. Ct. 1982). Concluding that no change of placement could occur without proper notice, the court ordered payment for a child's placement at a residential facility, even though the district no longer considered the child to be under its jurisdiction.

McGaw v. Huntington Hosp., 454 N.Y.S.2d 539 (App. Div. 1982). The court ruled that parents were eligible for reimbursement for their child's education related expenses including occupational, speech, and physical therapy. However, to receive reimbursement, they had to submit claims within the school year the services were provided.

Newport-Mesa Unified Sch. Dist. v. Hubert, 183 Cal. Rptr. 334 (Ct. App. 1982). Reasoning that "[i]t is inconceivable that the [stay-put provision] structured by Congress . . . would require parents to be compensated for costs they incurred in violating that very system," the court denied claims for tuition reimbursement made by parents who unilaterally moved their child from one private school to another during the pendency of review.

Walker v. Cronin, 438 N.E.2d 582 (Ill. App. Ct. 1982). The court awarded tuition reimbursement to parents who placed their child in a residential facility before receiving official approval.

New York City Bd. of Educ. v. Ambach, 452 N.Y.S.2d 731 (App. Div. 1982). A New York court ordered the payment of tuition for a student who was unilaterally enrolled in a private school when the parents had not received proper notice of the student's educational evaluation. Additionally, under New York law, the state was required to share the child's tuition and maintenance costs.

Foster v. District of Columbia Bd. of Educ., 523 F. Supp. 1142 (D.D.C. 1981). Where parents unilaterally moved their child to another institution, the court denied tuition reimbursement finding that they should have continued to pursue administrative appeals or should have sought an injunction.

Stemple v. Board of Educ. Prince George's County, 464 F. Supp. 258 (D. Md. 1979), *aff'd*, 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981). Parents were denied reimbursement for tuition when they unilaterally moved their handicapped child to a private school before an administrative hearing was held.

Hark v. School Dist. of Philadelphia, 505 F. Supp. 727 (E.D. Pa. 1980). The child had been appropriately placed in an out-of-state residential facility for children with emotional and learning disabilities. Having concluded that the parents were entitled to the tuition, however, the court found no administrative procedure available to the parents whereby this claim might be pursued.

Plitt v. Madden, 413 A.2d 867 (Del. 1980). Parents were not reimbursed for unilaterally transferring their LD child from the public school to a private school, because the public school was found to be appropriate. There remained some question, however, on the timeliness of administrative hearings, so the case was remanded to deal with this issue.

Lafko v. Wappingers Cent. Sch. Dist., 427 N.Y.S.2d 529 (App. Div. 1980). The Commissioner of Education had the authority to deny the approval of a placement and of reimbursement to parents if a private school had not previously been approved for the education of handicapped children.

Moran v. Board of Directors, Sch. Dist. of Kansas City, 584 S.W.2d 154 (Mo. Ct. App. 1979). The court reversed a tuition award to the parents of a mentally retarded junior high school student basing its decision on Missouri administrative law since the school district's action predated the EHCA.

Scavella v. School Bd. of Dade County, 363 So. 2d 1095 (Fla. 1978). The school district claimed that it could only provide the amount of reimbursement received from the state to handicapped children who were receiving their education in private schools. The court rejected the district's reasoning, finding that, while it could set a cap on expenditures, it must not be so low as to deny an adequate education to handicapped children.

Lux v. Connecticut State Bd. of Educ., 386 A.2d 644 (Conn. Super Ct. 1978). The state hearing officer had no authority to order the reimbursement of private school expenses. The parents of the child in this case enrolled their child in private school without appealing the district's proffered placement. The child remained in private school for three full years before the parents requested reimbursement. The court found reimbursement inappropriate because the parents never challenged the district placement.

Amherst-Pelham Reg. Sch. Comm. v. Department of Educ., 381 N.E.2d 922 (Mass. 1978). After rejecting the district proposed placement, the parents enrolled their handicapped child in a private residential institution and subsequently sought reimbursement. The Bureau of Child Advocacy upheld the parents' selection as the appropriate placement. The court did not find error in the decision or the procedure and ordered the reimbursement even though the district did not have the opportunity to suggest a public residential facility which may have also been appropriate.

***In re* Meyer**, 392 N.Y.S.2d 468 (App. Div. 1977). In a New York case, the court ruled that parents could not be denied reimbursement for the education of their handicapped children on the grounds that the costs were excessive.

***In re* William B.**, 389 N.Y.S.2d 222 (Fam. Ct. 1976). A New York hospital, which filed its request for reimbursement for educating two handicapped foster children after the cut-off date, was denied an extension.

***In re* Tobias**, 386 N.Y.S.2d 735 (Fam. Ct. 1976). Parents were denied reimbursement for private school expenses because they failed to prove the public schools could not furnish an appropriate program.

***In re* L.**, 384 N.Y.S.2d 392 (N.Y. 1976). A requirement that parents file a reimbursement petition for those who paid tuition to private schools within one year was upheld.

***In re* Richard G.**, 383 N.Y.S.2d 403 (App. Div. 1976). The Family Court had the authority to order reimbursement for summer programming if this was required to meet the needs of the child. The case was remitted to determine need and to determine whether the parentally selected summer camp met that need.

***In re* Lawrence P.**, 383 N.Y.S.2d 370 (App. Div. 1976). Where the parents requested financial assistance in May 1974, and the district did not complete the proper form until August of that year, the requirement for filing within the school year was waived.

***In re* Stein**, 365 N.Y.S.2d 450 (Fam. Ct. 1975). Where a child with organic brain syndrome was enrolled in a program the parent called "summer school," reimbursement was granted notwithstanding district contentions that the program was a "camp" with limited educational value.

***In re* Vlado**, 358 N.Y.S.2d 72 (App. Div. 1974). A request for reimbursement of educational expenses was approved even though the mother failed to file within the specified period of time.

Attorney Fees Generally

Krichinsky v. Knox County Schs., 963 F.2d 847 (6th Cir. 1992). The parents were ruled entitled to attorney fees, notwithstanding the fact that they were unsuccessful in obtaining a residential placement for their child, given that they did obtain increased speech, language, and occupational therapies.

Moore v. Crestwood Local Sch. Dist., 804 F. Supp. 960 (N.D. Ohio 1992). The parents were awarded over $44,000 for attorney fees and related costs calculated at $125 to $150 per hour.

Aranow v. District of Columbia, 780 F. Supp. 46 (D.D.C. 1992). The parents in this case were found to be the prevailing party given that they succeeded in acquiring appropriate educational placements for their children. As a result, they sought attorney fees and costs associated with the services of an expert witness, who was used at the administrative level. The court held that the attorney fees requested were reasonable in both number of hours and hourly rate, but denied the expert witness fee of $2,304.65. The court reasoned that an attendance fee of $40 per day plus $9 for parking was all the law required. In reaching this decision, the court compared the language and history of section 1988 to that of the Handicapped Children's Protection Act.

Huldah A. v. Easton Area Sch. Dist., 601 A.2d 860 (Pa. Commw. Ct. 1992). The parents of a gifted child were not eligible to receive attorney fees or reimbursement for costs associated with obtaining an independent evaluation of their child.

Wheeler v. Towanda Area Sch. Dist., 950 F.2d 128 (3d Cir. 1991). This action was brought by the parents of a deaf student to recover attorney fees incurred during a previous case regarding interpreter services. The court denied the fees and held that the parents were not the "prevailing" party. To prevail, the parents must have succeeded on any significant issue in litigation (i.e., did plaintiffs (1) achieve relief, and (2) was there a causal connection between the litigation and the relief from the defendant).

Burr *ex rel.* Burr v. Sobol, 748 F. Supp. 97 (S.D.N.Y. 1990). The plaintiff was held to be entitled to attorney fees and costs for time spent opposing the petition for *certiorari* and the consolidation of his case with another, even though he did not succeed on those issues, due to the fact that he received compensatory education.

Brown v. Wilson County Sch. Bd., 747 F. Supp. 436 (M.D. Tenn. 1990). The district court could award attorney fees even though the appellate division had not yet rendered its decision.

Community Consol. Sch. Dist. No. 54 v. Illinois State Bd. of Educ., 576 N.E.2d 250 (Ill. App. Ct. 1991). The district had no right under IDEA to require the Illinois State Board of Education or the Illinois Department of Mental Health and Developmental Disabilities to share responsibility for reimbursing attorney fees to the parents of a handicapped child who prevailed at other proceedings. The court found the right to claim attorney fees was provided only to the "prevailing party," and, in the present case, the district was one of several losing defendants.

Angela L. v. Pasadena Indep. Sch. Dist., 918 F.2d 1188 (5th Cir. 1990). The court upheld the award and amount of attorney fees in a case where the plaintiff was held to be the prevailing party.

Christopher P. v. Marcus, 915 F.2d 794 (2d Cir. 1990). The mother of a handicapped child sued various state and local medical and school officials claiming that her son was discharged from a special school without the necessary procedures being followed. The mother was not the prevailing party in the suit and therefore was not entitled to attorney fees.

Burr *ex rel.* Burr v. Ambach, 683 F. Supp. 46 (S.D.N.Y. 1988), *rev'd in part, dismissed in part and remanded*, 863 F.2d 1071 (2d Cir. 1988), *vacated and remanded*, 109 S. Ct. 3209 (1989), *on remand*, 888 F.2d 258 (2d Cir. 1989). The district court granted attorney fees paid by the school district, but denied fees paid by the state Commissioner of Education. The appeals court remanded that portion of the decision which dealt with attorney fees paid by the Commissioner, but provided additional relief of one and one-half years compensatory education for denial of a FAPE. The Supreme Court vacated and remanded in light of the ***Muth*** decision. On remand, the appeals court found that the Eleventh Amendment was not violated by the award of compensatory education.

Abu-Sahyun *ex rel.* Abu-Sahyun v. Palo Alto Unified Sch. Dist., 843 F.2d 1250 (9th Cir. 1988), *aff'd appeal after remand*, 881 F.2d 1083 (9th Cir. 1989). The court found that the lower court acted *ultra vires* in denying retroactive attorney fees to plaintiffs who prevailed in an action under the EHA prior to the passage of the Handicapped Children's Protection Act. The lower court based its decision on the belief that the district had no expectation of paying the fees, and that to impose fees after the fact was unfair. The case was remanded for a determination of the appropriate award.

James v. Nashua Sch. Dist., 720 F. Supp. 1053 (D.N.H. 1989). Following a twenty-seven month delay, parents of a handicapped child sought and received attorney fees under the EHA, given New Hampshire's three-year statute of limitations.

Max M. v. Illinois State Bd. of Educ., 684 F. Supp. 514 (N.D. Ill. 1988), *aff'd sub nom.*, **Max M. v. New Trier High Sch. Dist.**, 859 F.2d 1297 (7th Cir. 1988). The court allowed an award of attorney fees for a 1986 action, prior to the passage of the Handicapped Children's Protection Act which retroactively allowed attorney fees for plaintiffs prevailing under the EHA. The award was reduced by 50% since the parents did not prevail on all issues.

Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 794 (11th Cir. 1988). The court found that, where an attorney fee award was justified, it bore interest from the day of the original judgment, or on the day on which the original judgment was modified.

Tonya K. *ex rel.* Diane K. v. Board of Educ. of Chicago, 847 F.2d 1243 (7th Cir. 1988). Two years after a consent decree settled a dispute involving the length of time between diagnosis and placement of handicapped children, the plaintiffs moved for attorney fees. The court found that the lower court was justified in allowing the award and in apportioning the amount 50% to the board of education and 50% to the state. Both parties had an obligation to ensure that handicapped students were placed promptly after evaluation.

Arons v. New Jersey State Bd. of Educ., 842 F.2d 58 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 366 (1988). The court denied reimbursement of fees for the services of a nonlawyer who represented the prevailing plaintiffs in an action under the EHA. New Jersey law prohibited such reimbursement, and the court could find no basis within the EHA to preempt state statute.

Fontenot v. Louisiana Bd. of Elementary and Secondary Educ., 805 F.2d 1222 (5th Cir. 1986), *aff'd and remanded*, 835 F.2d 117 (5th Cir. 1988). Attorney fees were awarded under the EHA to an orthopedically handicapped student who was denied readmission to a program he had attended prior to being hospitalized for respiratory problems.

Puffer v. Raynolds, 761 F. Supp. 838 (D. Mass. 1988). The school was ordered to provide remedial services to compensate for procedural violation in the issuance of a high school diploma to a special education student. Attorney fees were awarded but were reduced based on the mother's refusal to accept remedial services when they were first offered, and because of the time spent pursuing unsuccessful claims under section 1983.

Michael M. v. Board of Educ. of New York City Sch. Dist., 686 F. Supp. 995 (E.D.N.Y. 1988). The court found that the Commissioner of Education, who acted to ensure that the Board of Education followed state law, could not be liable for attorney fee reimbursement.

Sidney K. *ex rel.* Harry K. v. Ambach, 535 N.Y.S.2d 468 (App. Div. 1988). The Commissioner of Education ignored a hearing officer's decision regarding the appropriate placement for a handicapped child. The parents brought suit, eventually prevailed, and received attorney fees.

Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14 (D.D.C. 1987). The court found that the attorney fees amendment to the EHA allowed retroactive application of fees even though the attorney fees issue was the only issue pending at the time the amendment was passed.

J.G. *ex rel.* Mrs. G. v. Board of Educ. of Rochester City Sch. Dist., 648 F. Supp. 1452 (W.D.N.Y. 1986), *modified and aff'd and remanded*, 830 F.2d 444 (2d Cir. 1987). The court allowed an award of attorney fees under section 1988 where the district violated provisions of the EHA related to student evaluation, placements, and the provision of procedural safeguards. The appeals court reduced the fee award because a claim against the State was dropped before the case moved to court.

Esther C. *ex rel.* Ephraim C. v. Ambach, 515 N.Y.S.2d 997 (Sup. Ct. 1987). An award of $90 per hour for 129.85 hours was not excessive for challenges against the Commissioner of Education who attempted to terminate plaintiff's public school placement.

Yaris v. Special Sch. Dist. of St. Louis County, 599 F. Supp. 926 (E.D. Mo. 1984), *amended*, 604 F. Supp. 914 (E.D. Mo. 1985), *aff'd*, 780 F.2d 724 (8th Cir. 1986), *cert. denied*, 106 S. Ct. 2896 (1986), *case reconsidered and rev'd*, 661 F. Supp. 996 (E.D. Mo. 1987). Attorney fees were initially disallowed as having no statutory basis. Upon reconsideration, after the Handicapped Children's Protection Act authorized retroactive attorney fees, the court granted full fees totalling $143,589.27.

Bonar ***ex rel.*** **Bonar v. Ambach**, 599 F. Supp. 945 (W.D.N.Y. 1984), *rev'd in part, vacated in part*, 771 F.2d 14 (2d Cir. 1985). The EHA was found to preclude an attorney fees award under section 1983.

Stock v. Massachusetts Hosp. Sch., 467 N.E.2d 210 (Mass. 1985), *cert. denied*, 106 S. Ct. 132 (1985). The court denied attorney fees for the portion of a claim dealing with equal protection, finding that the EHA was the exclusive remedy in these matters. A portion of fees for denial of due process was provided under section 1983, however.

Stuart ***ex rel.*** **Stuart v. Nappi**, 610 F. Supp. 90 (D. Conn. 1985). The court found an expulsion to be a change of placement and a procedural exception to the ***Smith*** ruling. Attorney fees of $57,631 were awarded under section 1988, of which 80% was due from the local district, and 20% from the state.

Diamond v. McKenzie, 602 F. Supp. 632 (D.D.C. 1985). The Supreme Court ruling that attorney fees are not available under the EHA did not preclude the award under the "American Rule." Fees were based on the school district's bad faith where it filed an administrative action against the parent for failure to cooperate with school efforts the day after it commended her cooperation.

Laughlin v. School Dist. No. 1, Multnomah County, 686 P.2d 385 (Or. Ct. App. 1984), *aff'd*, 689 P.2d 335 (Or. Ct. App. 1984), *review denied*, 675 P.2d 50 (Or. 1985). The court found that *Smith* did not disallow the award of attorney fees where there was a legitimate claim under section 504 as well as the EHA.

Smith v. Cumberland Sch. Comm., 703 F.2d 4 (1st Cir. 1984), *aff'd sub nom.*, **Smith v. Robinson**, 104 S. Ct. 3457 (1984). The court found that no right to recover attorney fees was provided within the EHCA. In addition, neither section 504 nor section 1983 could be used to recover attorney fees for cases brought under the EHCA.

Hurry v. Jones, 560 F. Supp. 500 (D.R.I. 1983), *aff'd in part, rev'd in part*, 734 F.2d 879 (1st Cir. 1984). The court held that attorney fees were available under the EHA where the school district took over three years to provide transportation to a handicapped child.

Benner ***ex rel.*** **Benner v. Negley**, 556 F. Supp. 749 (N.D. Ind. 1983), *aff'd*, 725 F. 2d 446 (7th Cir. 1984). Defendants brought action for attorney fees, claiming a meritless suit on the part of the plaintiff. The court ruled that section 1983 could not be used as grounds for attorney fee awards to benefit plaintiffs or defendants when action was brought under EHCA.

Quackenbush v. Johnson City Sch. Dist., 716 F.2d 141 (2d Cir. 1983). The court found that section 1983 may be used to attain a damage award where procedural safeguards outlined in the EHA are denied. The court remanded the case to determine if allegations that the district routinely denied expensive placements and access to procedural safeguards were substantiated.

Association for Retarded Citizens of N.D. v. Olson, 561 F. Supp. 495 (D.N.D. 1982), *modified*, 713 F.2d 1384 (8th Cir. 1983). Attorney fees were awarded under section 1988 to plaintiffs who successfully challenged certain conditions in institutions. The award was reduced on appeal because of the long period of time used to support their claims. It was the court's view that plaintiffs could have supported their position in a fraction of the time actually devoted.

Doe ***ex rel.*** **Doe v. Koger**, 710 F.2d 1209 (7th Cir. 1983). The appeals court concluded that section 1983 could not be used as grounds for attorney fee payments when an action was brought under EHCA to challenge the district policy of expelling handicapped students for disciplinary reasons.

Hayward v. Thompson, 593 F. Supp. 57 (N.D. Ill. 1984). The court dismissed the request for attorney fees, finding no authority for such an award within the EHA.

Parker v. District of Columbia, 588 F. Supp. 518 (D.D.C. 1983). The court awarded tuition plus attorney fees after the parents proved that the school district acted in bad faith when it failed to provide the child an adequate education.

William S. v. Gill, 572 F. Supp. 509 (N.D. Ill. 1983). The court found that section 504 could not be used to recover attorney fees for EHCA claims.

Christopher N. v. McDaniel, 569 F. Supp. 291 (N.D. Ga. 1983). The determination of whether attorney fees were appropriate under section 504 or section 1988 for a district's failure to provide an emotionally disturbed child with a FAPE was a matter for trial.

Rollison v. Biggs, 567 F. Supp. 964 (D. Del. 1983). Attorney fees were not available under the RA where claims were filed for violation of the EHA.

Pratt v. Board of Educ. of Frederick County, 674 F.2d 259 (4th Cir. 1982). Attorney fees were awarded under the RA.

Robert M. v. Benton, 671 F.2d 1104 (8th Cir. 1982). Attorney fees were awarded for a successful EHCA claim based on section 1983.

Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982). Attorney fees were awarded under section 1988, and apportioned 80% against the city and 20% against the state where both failed to meet statutory and constitutional obligations under the EHCA and section 504.

Reineman v. Valley View Community Sch. Dist. #365-U, 539 F. Supp. 876 (N.D. Ill. 1982). The village and village police officers were denied attorney fees as the prevailing defendants for a case in which a high school student was suspended, and later criminally prosecuted, for bringing a knife to school. (*See also*, **Reineman v. Valley View Community Sch. Dist. #365-U**, 527 F. Supp. 661 (N.D. Ill. 1981).)

Turillo v. Tyson, 535 F. Supp. 577 (D.R.I. 1982). Fees were awarded under section 1988 to a plaintiff who was successful in achieving his goals under the EHA during administrative proceedings. Since the plaintiff was unsuccessful in stating a claim under the RA, fees for work on these claims were denied.

Davis v. District of Columbia Bd. of Educ., 530 F. Supp. 1215 (D.D.C. 1982). The plaintiff was entitled to full attorney fees under the RA even where the court did not adopt all the plaintiff's proposals. The defendants did not prevail in any claim, making the plaintiff the prevailing party.

Patsel v. District of Columbia Bd. of Educ., 530 F. Supp. 660 (D.D.C. 1982). The court awarded attorney fees under the RA to parents who were successful in their claims that they were denied a due process hearing as outlined in the EHA.

Hymes v. Harnett County Bd. of Educ., 664 F.2d 410 (4th Cir. 1981). Fees were allowed under section 1988 for litigating a successful 1983 claim. The award covered the costs of court hearings and preparation on arguments made on behalf of the fee payment.

Department of Educ. v. Valenzuela, 524 F. Supp. 261 (D. Haw. 1981). Section 1988 was used to permit the payment of attorney fees related to an EHCA appeal.

Attorney Fees for Administrative Review

Mr. L. & Mrs. L *ex rel.* Matthew L. v. Woonsocket Educ. Dep't, 793 F. Supp. 41 (D.R.I. 1992). Defendants were awarded summary judgment in a case where the parents of a child with a disability sought attorney fees, costs, and expenses incurred during administrative hearings. In ruling for the school officials, the district court held the relief received by the parents was no greater than the district's prior settlement offer and that the relief received would have to have been greater to justify the requested fees.

Cousin v. District of Columbia, 142 F.R.D. 574 (D.D.C. 1992). The court held that the Eleventh Amendment did not prohibit the award of attorney fees to prevailing parties.

Johnson v. Bismarck Pub. Sch. Dist., 949 F.2d 1000 (8th Cir. 1991). While the court found that attorney fees could be available for administrative procedures, the plaintiff was denied fees because she had unreasonably protracted the process by commencing litigation. The court reasoned that it was foreseeable that litigation would result in little gain and concluded that the lower court had not abused its discretion in denying the fee award.

Capiello v. District of Columbia, 779 F. Supp. 1 (D.D.C. 1991). The plaintiffs were awarded attorney fees which they incurred during administrative hearings to compel the defendants to removed their child from a hospital and place him in a residential school.

Reid v. Board of Educ. Lincolnshire-Prairie View Sch. Dist. 103, 765 F. Supp. 965 (N.D. Ill.

1991). The court found that parents who prevail at administrative hearings are eligible for attorney fees and may seek relief under section 1983 as a means of enforcing the hearing officer decision.

Moore v. District of Columbia, 666 F. Supp. 263 (D.D.C. 1987), *rev'd*, 886 F.2d 335 (D.C. Cir. 1989), *vacated and district court decision aff'd*, 907 F.2d 165 (D.C. Cir. 1990) (*en banc*), *cert. denied*, 111 S. Ct. 556 (1990). In the initial *en banc* decision, a divided court reversed a district court decision which had awarded attorney fees and costs incurred in bringing administrative actions under the EHA. The dissenting justices observed that the majority decision is contrary to virtually all decisions rendered by other circuits and to the clear intent of statute. The present case is a rehearing of a previous *en banc* decision. This second decision vacated the previous panel decision and upheld the award of the fees.

Independent Sch. Dist. No. 623, Roseville, Minn. v. Digre, 893 F.2d 987 (8th Cir. 1990). Given the existence of faulty state regulations regarding administrative hearings, a parent pursued administrative appeals although they would prove futile. Later, the plaintiff requested that attorney fees be paid by the district, but the request was refused. On appeal, the Eighth Circuit upheld a district court order awarding the requested fees.

Howey *ex rel.* Howey v. Tippecanoe Sch. Corp., 734 F. Supp. 1485 (N.D. Ind. 1990). This case dealt with a request for reimbursement for legal fees incurred in an administrative proceeding. The court held that the parents were the prevailing party and were entitled to reimbursement, but reduced the amount of fees to reflect the extensive and expansive fashion in which litigation continued after the parents had achieved most of their objectives.

McSomebodies v. Burlington Elementary Sch. Dist., 886 F.2d 1558 (9th Cir. 1989) and **McSomebodies v. San Mateo City Sch. Dist.**, 886 F.2d 1559 (9th Cir. 1989). **McSomebodies v. San Mateo City Sch. Dist.**, 897 F.2d 975 (9th Cir. 1989). Parents who prevailed at an administrative hearing sought and received attorney fees, costs, and expenses.

Mitten *ex rel.* Mitten v. Muscogee County Sch. Dist., 877 F.2d 932 (11th Cir. 1989). The court held that the parents of a handicapped child prevailed at an administrative hearing and were thus entitled to attorney fees. The court further noted, however, that the ability of the parents to pay related fees was an irrelevant factor in determining their entitlement to such fees.

Hyden *ex rel.* Hyden v. Board of Educ. of Wilson County, 714 F. Supp. 290 (M.D. Tenn. 1989). The parents of a child with a hearing impairment and consequent damage to the development of her speech and language were not awarded attorney fees, because the placement they received through a due process hearing was not materially different from the one previously offered by the district.

Mr. D. *ex rel.* Constance D. v. Glocester Sch. Comm., 711 F. Supp. 66 (D.R.I. 1989). The parents of a blind child had previously succeeded in their attempt to compel the school district to provide their daughter with a certified teacher of the blind and now brought action to recover attorney fees. The court held that the parents were entitled to attorney fees for services performed in administrative action only until the date that a teacher examined the daughter as part of a comprehensive reevaluation. The claim was therefore reduced from eighty to thirty hours.

Williams v. Boston Sch. Comm., 709 F. Supp. 27 (D. Mass. 1989). The court held that parents were entitled to reasonable attorney fees after they had succeeded in an administrative hearing, but limited the hourly rate to $125 per hour.

Duane M. v. Orleans Parish Sch. Bd., 861 F.2d 115 (5th Cir. 1988). Attorney fees were allowed for work related to the administrative hearing and for successfully defending an attorney fees award suit.

Eggers v. Bullitt County Sch. Dist., 854 F.2d 892 (6th Cir. 1[illegible]8). Attorney fees were awarded to parents who prevailed at administrative hearings notwithstanding the fact that the attorneys were employed by the State Department of Public Advocacy.

Counsel v. Dow, 666 F. Supp. 366 (D. Conn. 1987), *aff'd in part, rev'd in part*, 849 F.2d 731 (2d Cir. 1988), *cert. denied sub nom.*, **Connecticut v. Counsel**, 109 S. Ct. 391 (1988). Retroactive attorney fees were assessed against both the state and local district for action settled by consent decree. On appeal, the court found that the plaintiff did not prevail over the local school board where only the state was responsible for funding the child's compensatory education. The fee award against the local school board was dropped.

Doe v. Watertown Sch. Comm., 701 F. Supp. 264 (D. Mass. 1988). Parents who prevailed at administrative proceedings were eligible for attorney fees notwithstanding their move to another community before the district had the opportunity to appeal the decision.

Medford v. District of Columbia, 691 F. Supp. 1473 (D.D.C. 1988). An award of $100 per hour attorney fees was provided to plaintiffs who prevailed at administrative proceedings. In addition, the court approved fees for time the attorneys spent at the child's IEP meeting. The court reasoned that the attorney's attendance at each meeting brought results that were favorable to the plaintiffs, thereby justifying the award of fees.

Turton v. Crisp County Sch. Dist., 688 F. Supp. 1535 (M.D. Ba. 1988). The court ordered attorney fees to parents who prevailed in attaining an appropriate placement for their child at the administrative level. The fees were reduced 13% because the parents did not succeed in attaining reimbursement for unilaterally transferring their child to a private placement.

Robert D. v. Sobel, 688 F. Supp. 861 (S.D.N.Y. 1988). The parents of a handicapped child brought action to compel an appropriate placement for their child. After the Board of Education and the parents agreed to a placement at the initial hearing level, the Commissioner of Education refused to approve a contract with the chosen institution. While the school board was the defendant at the initial hearing level, the court found it to be "innocent participant" in the later action where the Commissioner's decision was questioned. The court ordered an award of attorney fees against the Commissioner of Education.

Michael M. v. Board of Educ. of New York City Sch. Dist., 686 F. Supp. 995 (E.D.N.Y. 1988). The court found that the Commissioner of Education, who acted to ensure that the Board of Education followed state law, could not be liable for attorney fee reimbursement.

Chang *ex rel.* Chang v. Board of Educ. of Glen Ridge Township, 685 F. Supp. 96 (D.N.J. 1988). Attorney and expert witness fees were provided to parents who attained a change in placement at the administrative level.

Neisz v. Portland Pub. Sch. Dist., 684 F. Supp. 1530 (D. Or. 1988). Parents of a paralyzed girl who was denied admission succeeded in their efforts to have their child placed in the district high school. They then brought this action to acquire attorney fees which were granted for both the administrative proceedings and the time spent attempting to obtain an injunction. However, the court found that the plaintiff's attorney failed to provide an itemized list of expenses which would have hastened the process. Fees were deducted for hours expended after the request for the list was made.

Moore v. District of Columbia, 674 F. Supp. 901 (D.D.C. 1987). A fee award totalling $29,357 for administrative proceedings and $19,117 for attorney fee litigation was granted. In addition to reimbursement of counsel fees, the court allowed reimbursement for the services of an educational diagnostician and a clinical psychologist who assisted in the case.

Mathern v. Campbell County Children's Cent., 674 F. Supp. 816 (D. Wyo. 1987). The court awarded attorney fees to parents who prevailed at the administrative hearing level, finding that the court system was the proper forum to attain fees.

Unified Sch. Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987). The court awarded retroactive attorney fees to parents who prevailed by attaining physical and occupational therapy for their child at the administrative level.

Moore v. District of Columbia, 666 F. Supp. 263 (D.D.C. 1987). Attorney fees were granted to parents who prevailed at administrative proceedings. The court also ruled that the provision allowing retroactive fees was constitutional.

Kristi W. *ex rel.* Russell W. v. Graham Indep. Sch. Dist., 663 F. Supp. 86 (N.D. Tex. 1987). Parents who prevailed on the primary issue and a secondary issue, and failed on the remaining three issues at the administrative level were granted full attorney fees as the prevailing party.

School Bd. of County of Prince William v. Malone, 662 F. Supp. 999 (E.D. Va. 1987). The court allowed an award of retroactive attorney fees to parents who prevailed at the administrative level.

Fees of $100 per hour totaling $11,770 were found to be reasonable under the Act.

Burpee v. Manchester Sch. Dist., 661 F. Supp. 731 (D.N.H. 1987). The parents were entitled to attorney fees for administrative proceedings.

Rollison v. Biggs, 656 F. Supp. 1204 (D. Del. 1987), *rehearing denied*, 660 F. Supp. 875 (D. Del. 1987). Parents were denied reimbursement of attorney fees for administrative proceedings. The court found that they were not prevailing parties reasoning that although a prospective change in local procedures resulted from their action, they did not benefit from the change nor did they receive the relief they sought. Additionally, the court found no basis to allow an award of attorney fees where the action was resolved at the administrative level before proceeding to the courts.

Prescott v. Palos Verdes Peninsula Unified Sch. Dist., 659 F. Supp. 921 (C.D. Cal. 1987). The court allowed an attorney fee award to parents who prevailed at the administrative level.

Blazejewski *ex rel.* **Blazejewski v. Board of Educ. of Allegany Cent. Sch. Dist.**, 599 F. Supp. 975 (W.D.N.Y. 1985). Attorney fees under section 1988 were awarded for administrative proceedings and for injunctive action where the district failed to meet a child's needs as required under the EHA.

Teresa Diane P. *ex rel.* **Marilyn J.P. v. Alief Indep. Sch. Dist.**, 744 F.2d 484 (5th Cir. 1984). An attempt to secure attorney fees under section 504 and section 1988 for actions brought under the EHA was dismissed. Additionally, an award of attorney fees for representation at administrative hearings was denied.

Monahan v. Nebraska, 575 F. Supp. 132 (D. Neb. 1983), *rev'd in part sub nom.*, **Rose v. Nebraska**, 748 F.2d 1258 (8th Cir. 1984). Attorney fees were not allowed for administrative procedures.

Noe v. Ambach, 542 F. Supp. 70 (S.D.N.Y. 1982). Fees were denied to attorneys who represented plaintiffs solely in successful state administrative proceedings.

Attorney Fees Prior to Administrative Review

Fenneman v. Town of Gorham, 802 F. Supp. 542 (D. Me. 1992). The court held that IDEA did not require the payment of attorney and expert fees associated with the pupil evaluation team meeting. Such meetings were intended to be nonadversarial and informal. Ideally the educators and parents would be able to identify an appropriate program for the child through consensus at such meetings.

Barlow-Gresham Union High Sch. Dist. No. 2 v. Mitchell, 940 F.2d 1280 (9th Cir. 1991). Parents who were prevailing parties were entitled to reimbursement for attorney fees even where a resolution was reached prior to a due process hearing.

Fischer *ex rel.* **Fischer v. Rochester Community Schs.**, 780 F. Supp. 1142 (E.D. Mich. 1991). Parents who prevailed prior to an administrative hearing or litigation were denied attorney fees.

E.P. *ex rel.* **P.Q. v. Union County Regional High Sch. Dist. No. 1**, 741 F. Supp. 1144 (D.N.J. 1990). In this case dealing with a request for legal fees, the court held that a separate action can be brought for attorney fees for work done prior to an administrative hearing and that the plaintiff was the prevailing party in a settlement agreement.

Shelly C. *ex rel.* **Shelbie C. v. Venus Indep. Sch. Dist.**, 878 F.2d 862 (5th Cir. 1989). Appeal of summary judgment for the handicapped plaintiff was reversed on appeal. The circuit court held that genuine issues of material fact precluded summary judgment, but that attorney fees were recoverable under the Handicapped Children's Protection Act even when a settlement was reached prior to a due process hearing.

Child v. Spillane, 866 F.2d 691 (4th Cir. 1989). A local school district that originally denied admission to a kindergarten child with AIDS reconsidered the decision and allowed admission before the parents initiated court action. The court denied attorney fees to the parents where the matter never proceeded to official due process procedures.

Rossi v. Gosling, 696 F. Supp. 1079 (E.D. Va. 1988). The court ruled that fees for work done prior to formal proceedings were allowed. However, the case was postponed because questions existed as to what degree the parents had prevailed during earlier proceedings.

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Expert Witness & Professional Fees

Aranow v. District of Columbia, 791 F. Supp. 318 (D.D.C. 1992). The plaintiff in this case moved to amend a previous decision (780 F. Supp. 46) denying reimbursement for costs incurred for expert witness fees. The motion for the parents was granted as the court held that such fees could be awarded under the Handicapped Children's Protection Act.

Chang *ex rel.* Chang v. Board of Educ. of Glen Ridge Township, 685 F. Supp. 96 (D.N.J. 1988). Attorney and expert witness fees were provided to parents who attained a change in placement at the administrative level.

Moore v. District of Columbia, 674 F. Supp. 901 (D.D.C. 1987). In addition to reimbursement of counsel fees, the court allowed fees for services of an educational diagnostician and a clinical psychologist who assisted in the case.

Damages

Valerie J. v. Derry Coop. Sch. Dist., 771 F. Supp. 492 (D.N.H. 1991). The court joined "the Seventh, Eighth, and Eleventh Circuits in finding that the 'appropriate relief' authorized by EAHCA generally includes prospective relief and that a damage remedy is not generally consistent with the goals of the [EHA]." [at 493]

Silano v. Tirozzi, 651 F. Supp. 1021 (D. Conn. 1987). The plaintiff in this case was transferred to a private school after making no progress for two years in the program offered by the public school. The parents of the multihandicapped child additionally alleged that in bad faith the district concealed information about their child's progress in the public placement. The court found that in a case such as this, minimum damages may be available and ordered a trial on the merits of the claim.

Austin v. Brown Local Sch. Dist., 746 F.2d 1161 (6th Cir. 1984), *cert denied*, 105 S. Ct. 2114 (1985). The court found that the EHA was the sole remedy available for failure to provide a FAPE. Actions under section 504 and section 1983 were dismissed.

Max M. v. Thompson, 566 F. Supp. 1330 (N.D. Ill. 1983). The parents attempted to recover damages alleging that the district failed to provide them with an opportunity to participate in the IEP process. The court dismissed claims under section 504, section 1983, and state law, while requiring further argument to determine whether $8,855 tuition charges for educational services attained by the parents after the student received a diploma would be allowed.

Sanders *ex rel.* Sanders v. Marquette Pub. Schs., 561 F. Supp. 1361 (W.D. Mich. 1983). Where the school district allegedly failed to properly evaluate and place an LD child, the court ruled that the Civil Rights Act of 1871 could be used to vindicate the denial of these rights under the RA, but not under the EHA. Additionally, monetary damages might be available under the RA, but not the EHA.

Lindsay v. Thomas, 465 A.2d 122 (Pa. Commw. Ct. 1983). Under Pennsylvania law, there was no private right to recover monetary damages where an LD child allegedly suffered mental and emotional loss resulting from the school's failure to properly identify and place him.

Miener v. Missouri, 498 F. Supp. 944 (E.D. Mo. 1980), and 498 F. Supp. 949 (E.D. Mo. 1980), *aff'd in part, dismissed in part and remanded*, 673 F.2d 969 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 215 (1982). A child who suffered from learning disabilities and behavioral disorders resulting from a brain tumor was transferred from a public facility to a private facility. She claimed that this action deprived her of a FAPE and equal access to educational facilities due to her handicap. The court found that, while EHCA did not provide damage awards, damages could be awarded under section 504.

Manecke v. School Bd. of Pinellas County, 553 F. Supp. 787 (M.D. Fla. 1982). The court found no private right for damages under section 504.

Davis v. Maine Endwell Cent. Sch. Dist., 542 F. Supp. 1257 (N.D.N.Y. 1982). Where the child was allegedly denied a FAPE the court disallowed damage claims under both the EHA and the Fourteenth Amendment.

Ruth Anne M. v. Alvin Indep. Sch. Dist., 532 F. Supp. 460 (S.D. Tex. 1982). The court found that neither the RA nor section 1983 could be used to attain damages for failures under the EHA.

Chase v. Mousseau, 448 A.2d 1221 (R.I. 1982). The court concluded that damage claims could be joined with other issues still pending. The parents sought damages because a psychiatric report had been released to persons not connected with the case in violation of state statute.

Anderson v. Thompson, 495 F. Supp. 1256 (E.D. Wis. 1980), *rev'd*, 658 F.2d 1205 (7th Cir. 1981). Tuition plus standard items of costs were awarded to prevailing plaintiffs at the lower court level. On appeal, it was held that damages could only be provided under exceptional circumstances not present in the case at hand.

Jaworski v. Rhode Island Bd. of Regents for Educ., 530 F. Supp. 60 (D.R.I. 1981). Claims for damages were dismissed. The case was moot since the child had graduated from high school. The district was assessed a $1 damage award for failure to hold a timely hearing.

Boxall v. Sequoia Union High Sch. Dist., 464 F. Supp. 1104 (N.D. Cal. 1979). Where the school district had offered a home tutor one-hour per day, the parents sought damages and reimbursement for a full-time tutor provided over a two-year period. The court did not have the authority to provide such relief.

Compensatory Education

Murphy v. Timberlane Regional Sch. Dist., 973 F.2d 13 (1st Cir. 1992). The circuit court vacated the district court's summary judgment in favor of the school district and remanded the case. The original complaint alleged that the district had failed to provide the plaintiff with a FAPE and should now be responsible for two years of compensatory education.

Big Beaver Falls Sch. Dist. v. Jackson ***ex rel.*** **Nesmith**, 615 A.2d 910 (Pa. Commw. Ct. 1992). Compensatory education was ordered in response to the district's delay in providing a multidisciplinary evaluation and placement and to the student being suspended for more than fifteen cumulative days without proper due process.

Valerie J. v. Derry Coop. Sch. Dist., 771 F. Supp. 483 (D.N.H. 1991). Seven and one-half months of compensatory education after high school graduation or the student's twenty-first birthday was ordered where the school district was unwilling to cooperate with the parents of a twelve-year-old for that period of time prior to a due process hearing.

Board of Educ. of Strongsville City Sch. Dist. v. Theado, 566 N.E.2d 667 (Ohio 1991). The hearing officer had authority under IDEA to consider issues of compensatory education even though the student was over twenty-one.

Lester H. *ex rel.* **Octavia P. v. Gilhool**, 916 F.2d 865 (3d Cir. 1990). Upheld the award of compensatory education for two and one-half years due to the district's violation of the EHA in unreasonably delaying the plaintiff's placement in an appropriate facility.

Burr v. Sobol, 888 F.2d 258 (2d Cir. 1989). A handicapped student appealed a state commissioner's decision denying him compensatory education. The circuit court, on remand from the Supreme Court, held that the Eleventh Amendment was not violated when it previously had vacated the decision of the state commissioner and had reinstated the decision of the hearing officer.

Board of Educ. of County of Lewis v. West Virginia Human Rights Comm'n, 385 S.E.2d 637 (W. Va. 1989). A county board of education appealed a Human Rights Commission decision requiring the board to provide a FAPE to hearing-impaired students until age twenty-four. Furthermore, the Commission awarded damages to the students and parents. The state high court held that the district had discriminated against the students and awarded them $2,500 for emotional distress, but also ruled that the parents were not entitled to damages for inadequate protection of their procedural rights.

Natrona County Sch. Dist. No. 1. v. McKnight, 764 P.2d 1039 (Wyo. 1988). Where statute provided education for handicapped children to age twenty-one, a student who claimed he was denied an adequate education prior to his twenty-first birthday could not receive compensatory education beyond that point.

White v. State, 240 Cal. Rptr. 732 (Ct. App. 1987). The court ruled that compensatory education may be appropriate to a class of children who resided at the state hospital. The plaintiffs claimed that they were denied a FAPE and that the hospital failed to spend EHA funds on resident children. Monetary damages were denied.

Miener v. Special Sch. Dist. of St. Louis County, Mo., 580 F. Supp. 562 (E.D. Mo. 1984), *dismissed*, 607 F. Supp. 1425 (E.D. Mo. 1985), *aff'd in part, reversed in part and remanded sub. nom.*, **Miener *ex rel.* Miener v. Missouri**, 800 F.2d 749 (8th Cir. 1986). Amended on remand from a previous case—673 F.2d 969 (8th Cir. 1982)—the court ruled that the RA could not be used to enforce rights protected by the EHA. The lower court dismissed the complaint by a child who allegedly was denied an appropriate education. On appeal, the court found that if such a denial existed, the child was eligible for compensatory education under the EHA.

Max M. v. Thompson, 585 F. Supp. 317 (N.D. Ill. 1984), *motion to amend granted in part, denied in part*, 592 F. Supp. 1450 (N.D. Ill. 1984). Reconsidering an earlier ruling in light of ***Timms***, the court stated that compensatory education services may be required where services were inappropriately denied in the past. On the motion to amend, charges against state officials in their individual capacities were dropped.

Timms v. Metropolitan Sch. Dist. of Wabash County, Ind., 654 F.2d 726 (7th Cir. 1981), *on appeal from remand*, 718 F.2d 212 (7th Cir. 1983). The court found that an award of compensatory education may be allowed under EHCA in the case of bad faith on the part of the school district. The court also agreed with other circuits that the EHCA was an exclusive remedy for procedural deficiencies in EHCA placements, and that section 504 could not be used to address these deficiencies.

Powell v. Defore, 699 F.2d 1078 (11th Cir. 1983). The parents of an LD child who was returned to the classroom sought damages and requested compensatory services to allow the child to "catch up" with his peers. The court found that neither the EHCA nor section 504 provided such relief.

Financial Issues

Equal Protection

DeNunzio v. Board of Educ. of City Sch. Dist. of N.Y., 396 N.Y.S.2d 236 (App. Div. 1977). Education budget cuts which appeared to have more drastic effect on programs for handicapped children did not facially deny equal protection.

Tuition

United Cerebral Palsy v. Sobol, 582 N.Y.S.2d 558 (App. Div. 1992). A provider of education for preschool and school-age children requested a tuition rate increase. Based on that request, it received a 25% increase for its school-age clientele, but only a 5% increase for those that were preschool. The plaintiff appealed that decision under state law, claiming that the percentage increases should have both been at the 25% level. The respondents moved to dismiss for failure to state a cause of action. That motion was granted, given that the Family Court in New York is the appropriate entity authorized by the state to approve tuition expenses of children with disabilities under the age of three. Accordingly, since no order had been issued by the Family Court and then refused by the state Commissioner of Education, the present action was viewed as premature.

Federal Funding

Freeman v. Cavozos, 756 F. Supp. 1 (D.D.C. 1990), 923 F.2d 1434 (11th Cir. 1991), *aff'd*, 939 F.2d 1527 (11th Cir. 1991). The Department of Education terminated school district funds under section 504 after the district failed to cooperate with an investigation based on parental complaints regarding residential placements. The district did not provide residential placements to handicapped students, viewing this as affirmative action not required under section 504.

Behavior Research Inst. Inc. v. Secretary of Admin., 577 N.E.2d 297 (Mass. 1991). The BRI was a specialized care facility that provided services to children with severe behavioral disorders and handicapping conditions. The BRI reported that it must receive reimbursement under the EHA from the Department of Education of $153,351 to provide services for each of two named students. While Massachusetts law provided that education would ensure "maximum possible development," nothing in that law provided that a particular student was entitled to receive services from a specified provider at a given rate.

Washington v. United States Dep't of Educ., 905 F.2d 274 (9th Cir. 1990). The DOE claimed that the state of Washington violated the EHA when it supplanted, rather than supplemented, state and local funds for the education of resident handicapped children. A reduction of expenditures had resulted when the state began educating all but the most severely handicapped children in regular classrooms in local schools, rather than in specialized segregated facilities. Because total and average expenditures dropped during the one-year period, due to greater mainstreaming and a reduction in transportation costs, the DOE concluded that federal funds had been used to supplant. On appeal, the circuit court held that the Act required the maintenance of local funding efforts; that in determining the number of handicapped children, the district must use head count rather than FTE, and that the present case should be remanded to determine whether an exception to the maintenance of effort requirement was available because of the unusually large expenditure in one year.

Louisiana State Bd. of Elementary and Secondary Educ. v. United States Dep't of Educ., 881 F.2d 204 (5th Cir. 1989). The United States Department of Education (DOE) required the state of Louisiana to refund $700,000 in grant money received under the EHA due to improper spending. The circuit court upheld the DOE action.

Commonwealth of Mass., Dep't of Educ. v. United States Dep't of Educ., 837 F.2d 536 (1st Cir. 1988). The court found that under the Tydings Amendment to the EHA, enacted in 1970 as P.L. 91-230, the federal Secretary of Education had the power to reallocate funds that were originally allocated to local education agencies if these funds were not obligated by the local agencies by the end of a specified carryover period.

Edward B. v. Brunelle, 662 F. Supp. 1025 (D.N.H. 1986). The court ruled that section three of the EAHCA, which discusses the relationship of the EHA to other applicable statutes, was not retroactive.

Wordsworth Academy v. Gaugler, 453 A.2d 1064 (Pa. Commw. Ct. 1982). Where the hearing officer ordered the Department to reimbursement expenses for a child's education, but the Secretary of Education later overturned the award, reimbursement was denied by the courts. The court based its decision on a section of the code that specified that expenses were to be paid by the Department only where placements were made with the approval of the Department.

State Funding

Durant v. State, 313 N.W.2d 571 (Mich. Ct. App. 1981), *rev'd and remanded*, 317 N.W.2d 854 (Mich. 1982), *dismissed*, **Durant v. Department of Educ.**, 342 N.W.2d 591 (Mich. Ct. App. 1983), *aff'd in part, rev'd in part*, 381 N.W.2d 662 (Mich. 1985), *remanded*, 463 N.W.2d 461 (Mich. Ct. App. 1990). Parents, taxpayers, and the local school district brought this action to compel the maintenance of the present funding level for handicapped students by the State Department of Education. Based on its interpretation of the state Headlee Amendment (which prevents the state from reducing its portion of necessary costs in given circumstances), the case was remanded for additional facts concerning necessary costs of programs, funding as categorical aid, and as applicable, the amount of underfunding.

Lincoln Intermediate Unit No. 12 v. Commonwealth, Dep't of Educ., 553 A.2d 1020 (Pa. Commw. Ct. 1989). Pennsylvania's special education funding laws provided that the state would pay the difference between the cost to educate a regular student and a special education student. Schools were to provide the state with a funding plan which was then reviewed by the state. Funding from the state was based both on state special education allocations and unit needs. In this case, the LIU provided a funding plan and an amended plan following state guidelines, but the state disapproved both. The court found that fact issues precluded judgment of whether the state was within its authority to deny the funding plans, and whether appropriate procedures for the denial were followed.

State v. Cochran, 764 P.2d 1037 (Wyo. 1988). The case was remanded for a determination of whether the State Board of Education had partial financial responsibility for services which had been provided to a handicapped student beyond his twenty-first birthday.

Fallis v. Ambach, 710 F.2d 49 (2d Cir. 1983). The court found that the plaintiffs lacked standing to question state action in reducing the required amount of reimbursement by local public school districts to private schools.

Alban v. County of Nassau, 455 N.Y.S.2d 379 (App. Div. 1982). The New York Commissioner of Education could require counties to pay additional residential tuition by promulgating a new rate structure even after the culmination of the school year, provided reimbursement claims were made within a reasonable period of time.

Board of Educ. of Greenburgh Cent. Sch. Dist. No. 7, Westchester County v. Ambach, 453 N.Y.S.2d 895 (App. Div. 1982). The court found that before ordering a school district to contract services for handicapped students with another district, the commissioner must decide whether the services are appropriate and reasonable, and must balance the increased cost to the district with the "added educational opportunity to the student."

Organization to Assure Servs. for Exceptional Students, Inc. v. Ambach, 432 N.Y.S. 54 (Sup. Ct. 1980), *rev'd and remanded*, 440 N.Y.S. 390 (App. Div. 1981), 449 N.Y.S.2d 952 (N.Y. 1982). The Commissioner of Education had the power to set tuition rates and teacher salary increases for schools that had contracted with the state to provide special education services.

Foundation for the Handicapped v. Department of Social and Health Servs. of Wash., 648 P.2d 884 (Wash. 1982). The court rejected the claim for the return of $83,000,000 that was collected by the state from institutionalized clients and their guardians for their care since 1967. However, the court found that some of the notices used to make the collections needed to be modified.

Pilato v. New York State Dep't of Educ., 406 N.Y.S.2d 562 (App. Div. 1978). The Commissioner of Education had the authority to refuse to approve a Family Court order to pay the cost of a private school that was not approved by the State Board of Education.

***In re* Suzanne E.**, 381 N.Y.S.2d 628 (Fam. Ct. 1976). The court ordered the state to pay one half the cost of educating a multihandicapped child in an out of state, residential placement.

County & Local Funding

Lake Erie Inst. of Rehabilitation v. Marion County, W. Va. Bd. of Educ., 798 F. Supp. 262 (W.D. Pa. 1992). Summary judgment was given to the defendant as the court held that the alleged promise of the superintendent to pay for rehabilitative services was *ultra vires* and did not bind the county board.

***In re* Todd P.**, 509 A.2d 140 (N.H. 1986). The court found that where the school district had not been provided the opportunity to review the IEP of a child who was placed in a home for delinquents, the school district could not be held financially responsible for the educational expenses of that placement.

School Comm. of Brookline v. Bureau of Special Educ. Appeals, 452 N.E.2d 476 (Mass. 1983). The court found that under Massachusetts law, the district could not claim a lack of funds to pay the private day school costs for a handicapped student based on statewide budgetary limits.

D.S. v. Board of Educ. of East Brunswick, 458 A.2d 129 (N.J. Super. Ct. App. Div. 1983). Where state statute required payment of the tuition and related costs where residential placement was appropriate to meet a child's educational needs, the district could not claim insufficient federal funding to assist in the payment.

Linder v. Wake County Bd. of Educ., 273 S.E.2d 735 (N.C. App. Ct. 1981). The court found that the parents had no standing to file a claim where a dispute existed between two districts over a tuition charge.

Hines v. Pitt County Bd. of Educ., 497 F. Supp. 403 (E.D.N.Y. 1980). The school district could not claim that it had insufficient funds to pay the tuition costs involved in educating an emotionally handicapped child.

M.R. v. Milwaukee Pub. Sch., 495 F. Supp. 864 (E.D. Wis. 1980). Parents attained a preliminary injunction preventing the termination of treatment services for handicapped children where the district claimed that program funding had been exhausted.

Quogue Union Free Sch. Dist. No. 3 v. County of Suffolk, 424 N.Y.S.2d 261 (App. Div. 1980). New York Education Law required that the county human services department would have to continue supporting the educational costs of four children it had placed in foster homes, despite changes in the law. The issue was not addressed under the EHCA.

Smith v. Cumberland Sch. Comm., 415 A.2d 168 (R.I. 1980). After examining legislative intent, the court concluded that school committees had to reimburse the state department for the educational services it provided at its institutions and that the department had no choice but to provide the educational services if they were not locally available for children with emotional disturbances.

North v. District of Columbia Bd. of Educ., 471 F. Supp. 135 (D.C. 1979). Despite district claims that the Department of Human Resources should pay for tuition to a residential facility, the court provided a preliminary injunction forcing the board of education to cover the costs, basing its decision on EHCA and RA requirements. The school board claimed that the child's problems were emotional rather than educational.

Elliott v. Board of Educ. of Chicago, 380 N.E.2d 1137 (Ill. App. Ct. 1978). The $2,500 statutory maximum on the annual amount school districts were required to pay for the education of individual handicapped children, who were excluded from public schools and who attended specialized facilities, was struck down.

State v. Stecher, 390 A.2d 408 (Conn. Super. Ct. 1978). The town of residence was not held liable for partial payment for the residential placement of a handicapped child.

Insurance Funds

Shook *ex rel.* Shook v. Gaston County Bd. of Educ., 882 F.2d 119 (4th Cir. 1989). The court found that a student had standing to sue for reimbursement three years after she reached the age of majority, where educational expenses were originally paid by her father's health insurance carrier. The student suffered a loss when her health insurance benefits were reduced from $100,000 to $36,000 lifetime maximum.

Estate Funds

***In re* Guardianship Estate of Zarse**, 529 N.E.2d 50 (Ill. App. Ct. 1988), *appeal denied*, 535 N.E.2d 923 (Ill. 1989). A deceased child left a large estate of funds attained from a medical malpractice settlement, and the state attempted to claim reimbursement for expenses related to the child's education against the estate. The court found no basis for the claim under the EHA.

Parent Funds

Parks v. Pavkovic, 536 F. Supp. 296 (N.D. Ill. 1982), *aff'd in part, rev'd in part*, 753 F.2d 1397 (7th Cir. 1985), *cert. denied sub. nom.*, **Belletire v. Parks**, 105 S. Ct. 3529 (1985) and 106 S. Ct. 246 (1985). A requirement that families assist in financing private residential placements based on family income was found to deny entitlement under EHCA. The court ordered the school district to fully fund future residential placements, including custodial expenses, where the placement was based on educational need.

Levine v. State Dep't of Insts. & Agencies, 418 A.2d 229 (N.J. 1980). A state statute requiring that parents with sufficient assets be required to pay for residential treatment violated the New Jersey Constitution, the EHCA, and the RA.

Guempel v. State, 387 A.2d 399 (N.J. Super. 1978). A parent who could afford his child's residential placement challenged the state requirement that parents pay partial costs based on their financial ability. The father claimed that the requirement was against the constitutional provision for a thorough and efficient system of free public schools. The court found that the requirement was reasonable in this case since (1) the child was not enrolled in the institution for educational reasons, but rather for the convenience of the family, and (2) the institution itself was primarily custodial rather than educational.

***In re* Scott K.**, 400 N.Y.S.2d 289 (Fam. Ct. 1977). The court found that where the child had an educational need for the services (summer placement), the parents could not be required to pay.

***In re* Levy**, 382 N.Y.S.2d 13 (N.Y. 1976). Parents of handicapped children who resided at educational institutions challenged the New York statute that required those who were financially capable to pay for their child's food and boarding expenses. The statute exempted parents of children who were deaf or blind, and parents of children with other handicaps alleged that the classification did not provide equal protection. The court found this prioritization to be within the power of Congress.

State Immunity

David H. *ex rel.* **Susan H. v. Palmyra Area Sch. Dist.**, 769 F. Supp. 159 (M.D. Pa. 1990), *aff'd without pub. opinion*, 932 F.2d 959 (3d Cir. 1991). The Eleventh Amendment barred an attempt to acquire reimbursement for tuition to a private school.

P.C. v. McLaughlin, 913 F.2d 1033 (2d Cir. 1990). Employees of the Vermont Department of Mental Health, who allegedly denied due process to a mildly retarded man, had qualified immunity from suit in their personal capacities. The court found no facts suggesting that the defendants knew they were denying the plaintiff's rights.

Muth v. Central Bucks Sch. Dist., 839 F.2d 113 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 103 (1988), *cert. granted sub. nom.*, **Gilhool v. Muth**, 109 S. Ct. 52 (1988), *rev'd and remanded*, **Dellmuth v. Muth**, 109 S. Ct. 2397 (1989), *appeal after remand, aff'd in part, rev'd in part*, 884 F.2d 1384 (3d Cir. 1989). The Supreme Court held that the EHA did not abrogate the states' constitutionally secured immunity from suit and observed that the Eleventh Amendment in the present case barred the respondent's attempt to collect tuition reimbursement from the state.

***In re* Walker**, 520 N.E.2d 777 (Ill. App. Ct. 1987), *rev'd*, 546 N.E.2d 520 (Ill. 1989). The court found that the state did not waive its Eleventh Amendment immunity, so an award against the state for the denial of an appropriate placement in a residential facility was denied.

Alexopulos v. San Francisco Unified Sch. Dist., 817 F.2d 551 (9th Cir. 1987). This action was brought against the district and state Department of Education for denying a student a free public education. The district changed the child's placement to home instruction because he bit another student. The parent was not notified nor did she provide consent. She then placed her child in a private school and was partially reimbursed by the public school based on the average sum the district expended for a nonhandicapped child. When the child turned twenty-two, he was denied continued support. The circuit court held that the Department of Education was shielded by the Eleventh Amendment from liability for compensatory education; that the parent's claims were time barred; that the student suffered no injury which could be a basis of claim under the RA; and that the EHA claim also was time barred.

Gary A. v. New Trier High Sch. Dist. No. 203, 796 F.2d 940 (7th Cir. 1986). The state had Eleventh Amendment immunity from suit brought by a boy seeking reimbursement for therapeutic services attained at a private residential facility. The local district did not enjoy the same immunity, however.

John H. v. Brunelle, 631 F. Supp. 208 (D.N.H. 1986). This case vacated a previous state law case by finding that the Commissioner of the State Department of Education did not have Eleventh Amendment immunity from suit for violations of the EHA.

Atascadero State Hosp. v. Scanlon, 677 F.2d 1271 (9th Cir. 1982), *on remand*, 735 F.2d 359 (9th Cir. 1984), 105 S. Ct. 3142 (1985). The Court found that the RA did not abrogate states' immunity to federal court suit.

John H. v. Brunelle, 500 A.2d 350 (N.H. 1985). The state did not waive its Eleventh Amendment immunity by adopting a state statute that allowed due process for claims under the EHA to extend to the courts. A waiver of immunity was not expressed in the state law and was not required by the EHA.

Pennhurst State Sch. v. Haldeman, 465 U.S. 89 (1984). The Court found that the Eleventh Amendment barred the use of state law claims in federal court cases.

Kerr Center Parents Ass'n v. Charles, 581 F. Supp. 166 (D. Or. 1983). The court found that under the Eleventh Amendment, the state was not immune from suit. The court based its finding on the fact that the EHCA was enacted pursuant to the Fourteenth Amendment under which congressional abrogation of rights was created.

Malpractice in Education

Agostine v. School Dist. of Philadelphia, 527 A.2d 193 (Pa. Commw. Ct. 1987). An LD student who was improperly placed in a class for mentally retarded children brought suit claiming educational malpractice. The court denied relief finding no guarantee of a particular level of education within the Constitution or statute.

Johnson v. Clark, 418 N.W.2d 466 (Mich. Ct. App. 1987). An LD student who could not read beyond the fourth grade upon his graduation filed suit claiming educational malpractice. The court ruled that neither the EHA nor state law provided a private right to sue for damages.

Snow v. New York, 469 N.Y.S.2d 959 (App. Div. 1983), *aff'd mem.*, 475 N.Y.S.2d 1026 (N.Y. 1984). In this case, the deaf plaintiff had been placed in a residential state school when he was almost three years of age. He was evaluated with a standardized IQ test, resulting in a score of twenty-four and a notation of questionable hearing, but was not again tested until age nine, resulting in a score of fifty-seven. The trial court ruled that the initial evaluation was improper and that failure to re-evaluate the child promptly constituted medical, rather than educational, malpractice. In reaching its decision, the court noted that the plaintiff had received continuous treatment, medical as well as psychological; that hospital or medical records were kept, rather than educational records; and that payment had been made by the parent's medical insurance, rather than by a school district as payment for the provision of an IEP. The intermediate court affirmed, but reduced the award from $2.5 million to $1.5 million, and the state high court affirmed. The present case was distinguished from ***Hoffman*** in that the initial placement was improper, and that re-evaluation was justified in light of the child's lack of progress and the discovery that he was deaf.

Torres v. Little Flower Children's Servs., 485 N.Y.S.2d 15 (N.Y. 1984). A former student, who remained functionally illiterate despite his having received a public education, brought this educational malpractice action against the social services department and child care agency with which he was placed after his abandonment. The court ruled that just as public policy precluded an educational malpractice action against the school, it also precluded such an action against the child care agency which assumed a contractual obligation to provide the plaintiff an education. Public policy objections to judicial involvement in educational matters would not be precluded by the fact that the obligation to provide an education was due to contract, rather than due to statute or common law. This case was distinguished from ***Snow*** in regard to age of initial entry into the program, nature of the institution, and the kind of care provided.

Keech v. Berkeley Unified Sch. Dist., 210 Cal. Rptr. 7 (Ct. App. 1984). The plaintiffs sought damages and fees totaling over $107,000 for injury and hospitalization allegedly caused by district negligence. The plaintiffs complained that the school district: (1) failed to prepare an assessment within a reasonable period of time; (2) failed to inform the parents of their rights; (3) failed to provide a multidisciplinary evaluation of the child; (4) failed to employ a full IEP team at the first meeting; and (5) changed its recommendation for residential placement. The court found no statutory duty of care nor a duty to comply with procedural provisions of the state code to allow tortious action.

B.M. v. State, 649 P.2d 425 (Mont. 1982). The court ruled that the misplacement of a child in a special education program did not violate her constitutional right of due process or equal protection.

Doe v. Board of Educ., 453 A.2d 814 (Md. 1982). A former student alleged negligence or educational malpractice and tried to distinguish his case from the others by noting that he had identified specific individuals who had improperly evaluated him rather than simply to have claimed that the system in the aggregate had failed. The court viewed that difference as being without distinction, and upheld the lower court order providing summary judgment to the defendants. The child had been diagnosed by a school psychologist as having a brain injury, but later was diagnosed by a private physician as having a severe case of dyslexia, a learning disability. There were no claims of intentional or malicious acts as there had been in ***Hunter***.

Hunter v. Board of Educ. of Montgomery County, Md., 439 A.2d 582 (Md. 1982). In this case, the plaintiff alleged both malpractice and intentional and malicious acts. The court noted that the general rule regarding malpractice is that such claims are precluded by considerations of public policy including (1) the absence of a workable rule of care against which the defendant's conduct may be measured, (2) the difficulty in determining the cause and nature of any damages, and (3) the burden which would be imposed on the resources of the public school system. The court found money damages to be inappropriate for asserted errors in the educational process, but ruled that where acts willfully and maliciously injure a child such acts would be actionable under state tort law.

Tubell v. Dade County Pub. Schs., 419 So. 2d 388 (Fla. Dist. Ct. App. 1982). The court ruled that the plaintiff's educational malpractice complaint, which alleged mistesting and misclassification, failed to state a cause of action. The child had been placed in an improper special education program for a number of years which may have been to his detriment.

Aubrey v. School Dist. of Philadelphia, 437 A.2d 1306 (Pa. Commw. Ct. 1981). The court ruled that the courtroom was not a proper forum for resolution of personal conflicts concerning (1) the state board decision to include sex education in the public school curriculum, (2) the district's program to comply with that decision, or (3) the plaintiff's failing grade on a test of that subject matter. Accordingly, the parents were not allowed to recover money damages for severe emotional distress, mental anguish, damage to reputation, damage to employment qualifications, and loss of time and wages.

D.S.W. v. Fairbanks North Star Borough Sch. Dist., 628 P.2d 554 (Alaska 1981). The Supreme Court of Alaska dismissed the action brought on behalf of dyslexic students who claimed negligent classification, placement, and teaching, finding no cause of action for damages under the EHA.

Helm v. The Professional Children's Schs., 431 N.Y.S.2d 246 (App. Div. 1980). The court in this private school malpractice case ruled that, as a matter of public policy, the school may not be held liable when the child fails to learn.

Donohue v. Copiague Union Free Sch. Dist., 418 N.Y.S.2d 375 (N.Y. 1979). In this case, a high school graduate sued the school district for alleged educational malpractice and negligent breach of a constitutionally imposed duty to educate based on the claim that, notwithstanding the receipt of a certificate of graduation, he lacked even the rudimentary ability to comprehend written English on a level sufficient to enable him to complete an application for employment. The court ruled that although the state constitution obligated the legislature to provide a system of public schools, such a general directive was not intended to impose a duty to insure that each pupil receive a minimum level of education, the breach of which would entitle the student to compensatory damages. Accordingly, the court concluded that a cause of action against a school district seeking monetary damages for educational malpractice was not cognizable in the courts as a matter of public policy.

Hoffman v. Board of Educ., 424 N.Y.S.2d 376 (N.Y. 1979). This action was instituted on a complaint alleging that the defendant was negligent in its original assessment of the plaintiff's intellectual ability, and that it failed to retest the plaintiff pursuant to a psychologist's recommendation. The child was examined by a certified clinical psychologist who determined that he had an I.Q. of 74 and recommended that he be placed in a class for the mentally retarded. However, the psychologist was unsure of his findings due to the child's severe speech defect (i.e., the inability to communicate verbally made it difficult to assess the child's mental ability by means of the primarily verbal Stanford-Binet Intelligence Test). The psychologist recommended that the child be re-evaluated within two years. Three years later when he was only in part retested, he scored at the 90th percentile in reading readiness, but demonstrated low ability in both reading and math. Given the student's poor test performance and the teacher's daily observations, the child was not retested regarding I.Q. Nine years later he finally was retested with the Wechsler Intelligence Scale for Adults. He scored 94 and was not found to be retarded. The lower court had ruled in favor of the plaintiff. It had distinguished this case from ***Donohue*** in that the previous case was nonfeasance, while this one was misfeasance. The appeals court found the distinction to be of little consequence and reasoned that considerations of public policy precluded recovery for an alleged failure to properly evaluate the intellectual capacity of the child.

Pierce v. Board of Educ. of Chicago, 370 N.E.2d 535 (Ill. 1977). There was no legal cause of action under either the Illinois Constitution or applicable statutes for a Chicago student who claimed that he suffered compensable harm due to the school's failure to assign him to a special education program.

Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Ct. App. 1976). A high school graduate brought this action against the city school district seeking to recover for alleged negligence and intentional misrepresentation on the part of the school district which allegedly deprived him of basic academic skills. The state court of appeal held that the complaint failed to state a cause of action for either allegation. The court observed that for the plaintiff to have succeeded, he must have shown that (1) the defendant had a duty of care, (2) negligence constituted a breach of that duty, and (3) injury resulted as the proximate cause of the negligence. The court noted that "(u)nlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might — and commonly does — have his own emphatic views on the subject. The 'injury' claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers." As a result, the court concluded that none of the requirements for negligence existed in this case, and that as a matter of public policy the student lacked a cause of action.

Preschool

Rolla 31 Sch. Dist. v. State, 837 S.W.2d 1 (Mo. 1992) (*en banc*). The Supreme Court of Missouri, *en banc*, held that the state had violated the state constitution when it failed to fully fund a mandatory preschool special program.

Long Island Ass'n for Children with Learning Disabilities, Inc. v. Sobol, 572 N.Y.S.2d 787 (App. Div. 1991). The Department of Education acted arbitrarily by funding preschool programs at a rate of previous contracts rather than that agreed upon by the petitioners.

***In re* David "JJ"**, 517 N.Y.S.2d 606 (App. Div. 1987). The Family Court had the authority to order reimbursement for speech and physical therapy for a preschool age child where these services were educational rather than medical.

***In re* N.J.A.C.**, 497 A.2d 1272 (N.J. Super. Ct. 1985). The state statute defining a preschool handicap as "a condition which seriously impairs a child's functioning and which has a high predictability of seriously impairing normal education development" was found to be inconsistent with the EHA which required services for all handicapped children regardless of the severity of handicap.

Stewart *ex rel.* Stewart v. Salem Sch. Dist. 24J, 670 P.2d 1048 (Or. Ct. App. 1983). The court found that Oregon law did not require the school district to provide speech therapy to a four-year-old child where it did not provide educational services to other children in the three-to-five-year-old age range. The court noted, however, that if at least 50% of the children in this age group received some educational services, such a service would be required for handicapped children as well.

Zweiful v. Joint Dist. No. 1, Belleville, 251 N.W.2d 822 (Wis. 1977). A four-year-old child with exceptional needs did not have a right under the state constitution to enter kindergarten early, even though a policy had been adopted in some school districts within the state allowing early entrance. A state uniform policy only required that students be given the right to request early entrance, not to receive this entrance.

Swain v. State Bd. of Educ., 360 A.2d 887 (N.H. 1976). Where the parents of a three-year-old handicapped child desired a preschool program for their child, the court ruled that the district was restricted to providing programming to children kindergarten through grade twelve.

Higher Education Students

Wood v. President & Trustees of Spring Hill College, 978 F.2d 1214 (11th Cir. 1992). A schizophrenic student alleged that her dismissal from a college was due to her handicap and that her rights under the RA were therefore violated. The district court had entered judgment for the college pursuant to a jury verdict and the plaintiff appealed. On appeal, the circuit court affirmed the lower court judgment.

Madsen v. Boise State Univ., 976 F.2d 1219 (9th Cir. 1992). A university student with a disability alleged that the institution had violated the RA when it failed to provide him with free handicap parking permits. The appeals court held that the student lacked standing to bring the action because he had never actually applied for the permits.

Wynne v. Tufts Univ. Sch. of Medicine, 976 F.2d 791 (1st Cir. 1992). A former student with cognitive deficits was unable to substantiate a claim under RA that he was discriminated against when the university failed to offer him an alternative form of multiple-choice biochemistry examination.

Morse v. University of Vt., 973 F.2d 122 (2d Cir. 1992). A former student claimed a violation of the RA when the university refused to accommodate her handicap of hypothyroidism and failed to grant her a master's degree. The student failed to complete her program within the required five year period, although she did continue to take courses following her dismissal. Her claim was dismissed as time-barred.

Wynne v. Tufts Univ. Sch. of Medicine, 932 F.2d 19 (1st Cir. 1991). Issues of fact, regarding whether a medical student with dyslexia was "otherwise qualified," precluded summary judgment.

Nathanson v. Medical College of Pa., 926 F.2d 1368 (3d Cir. 1991). Where questions existed as to whether the university knew the plaintiff's condition was a handicap and whether it made reasonable accommodation, the court found that these issues of material fact precluded summary judgment.

Mosholder v. Ohio Rehabilitation Servs. Comm'n, 598 N.E.2d 1271 (Ohio Ct. App. 1991). A visually impaired student was denied tuition assistance by the Bureau of Services for the Visually Impaired and challenged the Bureau's method of determining her eligibility. She had requested that the Bureau calculate the amount of money it would contribute to her education if she attended a state university (Kent State University) and then provide that amount toward her tuition at Mount Union, a private institution with a tuition higher than KSU's. The plaintiff would then be willing to pay the difference. The appeals court held in favor of the student and required the Bureau to provide the "least cost" amount so that the plaintiff could attend the university of her choosing.

Villanueva v. Columbia Univ., 746 F. Supp. 297 (S.D.N.Y. 1990), *aff'd*, 916 F.2d 709 (2d Cir. 1990). A graduate student with cerebral palsy was unable to prove that her dismissal from graduate school was based upon discriminatory reasons. The student had twice failed a sociomedical sciences research methods exam, which would have qualified her to continue in the program.

United States v. Board of Trustees for Univ. of Ala., 908 F.2d 740 (11th Cir. 1990). The court found that the university's practice of denying free auxiliary services to handicapped students who were not in financial need violated the RA. However, if free services could be found elsewhere (i.e., through private funding services) the university did not have to duplicate the services.

McGuire v. Switzer, 734 F. Supp. 99 (S.D.N.Y. 1990). A paraplegic brought action challenging the New York state regulations capping his tuition funding. The court found that the state had a right to cap everyone's funding equally. However, it granted a motion to continue the action where the state allowed greater funding for blind individuals than it did for individuals with other handicaps.

Doe v. Southeastern Univ., 732 F. Supp. 7 (D.D.C. 1990). After officials at Southeastern University allegedly disclosed that a student had missed numerous classes due to HIV related illnesses, the student brought suit for invasion of privacy. The court found that tort claims were time barred, and that only equitable damages were available under the RA.

Fleming v. New York Univ., 865 F.2d 478 (2d Cir. 1989). A physically handicapped college student requested single occupancy in a double room in the college dormitory. After the young man was charged a single-room rate his first year, the university changed its housing policy to require that all students residing alone in double rooms be charged a higher rate. The student claimed that the policy discriminated against him because of his handicap, and the university modified its policy allowing a reduction to 75% of the fee. A lawsuit under the RA followed. The court found for the university, noting that the student requested the room and failed to show that other suitable housing was unavailable.

Stephanidis v. Yale Univ., 652 F. Supp. 110 (D. Conn. 1986), *aff'd*, 814 F.2d 654 (2d Cir. 1987). The court dismissed action by an applicant to the English Department at Yale who claimed handicap and age discrimination. There was no basis for suit under either the RA or the Age Discrimination Act where the plaintiff could not prove that the university was a recipient of federal financial aid.

Russell v. Salve Regina College, 649 F. Supp. 391 (D.R.I. 1986). A nursing student who was allegedly dismissed from a private school due to her obesity brought action under the Fifth and Fourteenth Amendments, the RA, and Rhode Island state law. Since the college was a private school that did not receive federal funding, the constitutional and RA claims were dismissed. The court refused to grant summary judgment on state law claims, finding that fact issues existed as to whether the student's obesity reduced her ability to perform her duties.

Wright v. Columbia Univ., 520 F. Supp. 789 (E.D. Penn. 1981). The district court ruled that (1) merely because the football program did not receive federal funds such circumstance did not render the program outside the coverage of the RA; and (2) the student was entitled to a temporary restraining order to prevent the university from barring his participation in intercollegiate football. The court distinguished the present case from ***Kampmeier*** in that the plaintiff was mature and well informed.

Employment

Byrne v. Board of Educ., Sch. of West Allis—West Milwaukee, 979 F.2d 560 (7th Cir. 1992). A teacher with an allergy to a fungus was unsuccessful in her claim that the district had discriminated against her when she was dismissed for absenteeism. At the district court level, the judgment was based on a jury verdict in favor of the board which denied the plaintiff a directed verdict and a new trial. That decision was affirmed on appeal to the Seventh Circuit.

McWright v. Alexander, 771 F. Supp. 256 (N.D. Ill. 1991). An employee of the United States Department of Education, who was unable to bear children due to her handicaps, was denied maternal child care leave when she adopted a child. The Department regulations specified that to qualify for the leave, employees must (1) attain medical certification of the need for the leave, and (2) provide specific notice in advance. The plaintiff met neither requirement, but claimed that a waiver should be granted due to her handicap. The court found that no denial of rights under section 504 existed where the regulations were applied consistently.

Pendleton v. Jefferson Local Sch. Dist. Bd. of Educ., 754 F. Supp. 570 (S.D. Ohio 1990). A teacher brought action under section 504, section 1983, and the equal protection clause claiming that harassment caused her multiple sclerosis to worsen, forcing her to take disability leave. The court found that the teacher was not required to exhaust administrative remedies; however, no violations were found.

Byrne v. Board of Educ., Sch. Dist. of West Allis—West Milwaukee, 741 F. Supp. 167 (E.D. Wis. 1990). The court refused to grant summary judgment to a school district that dismissed a teacher due to absenteeism caused by her allergy to a common fungus. The court found that issues of material fact existed as to whether the teacher was totally disabled and unable to perform her duties, and whether reasonable accommodations by the school district could allow continued employment.

Pierce v. Engle, 726 F. Supp. 1231 (D. Kan. 1990). A high school principal claimed that his contract was not renewed in part because he was a recovering alcoholic. He brought suit under the RA and under section 1983 claiming that he was denied due process in the nonrenewal. The court granted the defendants summary judgment finding the district's decision to move from a two principal to a one principal system was a bona fide reason for the nonrenewal.

Casino v. Mahopac Cent. Sch. Dist., 741 F. Supp. 1028 (S.D.N.Y. 1989). The school district that transferred a custodian who suffered from a severe heart condition to a newly created night position, failed to show a nondiscriminatory reason for the transfer. The court found for the plaintiff, but denied a contingency enhancement to the attorney fee award.

Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Brown, 558 A.2d 121 (Pa. Commw. Ct. 1989). The Pennsylvania Department of Transportation recalled motor vehicle and school bus driver licenses from individuals who suffered from chronic diseases such as epilepsy and heart disease, and this lawsuit resulted. Finding that a bone fide occupational qualification may exist, the court remanded the case for a determination of whether these drivers caused an appreciable risk to riders.

Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Chalfant, 565 A.2d 1252 (Pa. Commw. Ct. 1989). The defendants were unable to show that a bus driver, who had a diagnosed seizure disorder, was incompetent at the time his driver's license was recalled.

Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Tinsley, 564 A.2d 286 (Pa.

Commw. Ct. 1989). A diabetic bus driver, whose license was revoked solely due to her handicap, brought suit against the Department of Transportation. The court found that her diabetic condition had been under control for several years. Additionally, requiring the school board to perform a simple finger prick blood test for blood sugar levels prior to daily trips was not undue hardship on the part of the employer.

DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 844 F.2d 714 (10th Cir. 1988), *aff'd on remand*, 911 F.2d 1377 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 799 (1991). An applicant for a security position at a research laboratory run by the state university regents claimed that he was denied employment due to his handicap that of having vision in only one eye. The court found that at that time the university did not receive financial assistance within the meaning of the RA, and that the requirement that persons in security positions have vision in both eyes met the rational relationship test under the Fourteenth Amendment.

Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988). A teacher with AIDS who was transferred to an administrative job claimed a violation of the RA. The circuit court held that the teacher was not required to disprove every theoretical possibility of transmission and that although his return to the classroom would produce fear and apprehension in parents and students, such was not grounds to deny the requested preliminary injunction.

Recanzone v. Washoe County Sch. Dist., 696 F. Supp. 1372 (D. Nev. 1988). A handicapped special education teacher who suffered psychological and emotional distress, eventually forcing her to leave her position, was provided $70,000 in compensation under section 504. The plaintiff had not been given a standard teacher contract (although others with less experience received one), she received less assistance with teaching assignments than others received, and no efforts were made to accommodate her handicaps.

Moore v. Warwick Pub. Sch. Dist. No. 29, 794 F.2d 322 (8th Cir. 1986). A superintendent who was dismissed from his position while holding a one-year contract filed suit under section 1983 claiming failure to provide due process, and under the RA claiming handicap discrimination. Since his initial employment in 1978, the superintendent's vision deteriorated to near blindness from glaucoma. The case was remanded for trial on its merits.

Shuttleworth v. Broward County, 639 F. Supp. 654 (S.D. Fla. 1986). The County violated state handicap discrimination laws when it fired the plaintiff solely because he suffered from AIDS.

Duos v. Evangeline Parish Sch. Bd., 499 So. 2d 1067 (La. Ct. App. 1986). A teacher who developed Crohn's Disease filed suit for worker's compensation benefits against the school board and its compensation management service. The court held that the claim was time barred.

Norcross v. Sneed, 573 F. Supp. 533 (W.D. Ark. 1983), *aff'd*, 755 F.2d 113 (8th Cir. 1985). A visually handicapped librarian, who was allegedly denied school employment because of her handicap, failed to meet the burden of establishing intent to discriminate. While the school board discussed her handicap during the hiring process, they convinced the court that the plaintiff was denied employment because she was less qualified than other applicants.

Council for the Hearing Impaired Long Island Inc. v. Ambach, 610 F. Supp. 1051 (E.D.N.Y. 1985). Teachers at the state supported institutions for the deaf and blind brought action under the EHA, RA, and First, Ninth, and Fourteenth Amendments claiming they received lower salaries than teachers in the public schools. The court ruled that, if found to exist, this practice could result in a discriminatory denial of services to the students in these institutions, and as such, might be a violation of section 504. The court refused to issue summary judgment and ordered a trial on the merits of the case.

Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130 (S.D. Iowa 1984). The plaintiff was handicapped under the RA due to nocturnal epilepsy, dyslexia, and cerebral palsy with left sided hemiplegia. He was denied an interview for a teaching position solely because his handicap prevented him from attaining a bus driver's license. However, the court reasoned that the district had an increased obligation to take positive steps to employ handicapped individuals given that it was a recipient of EHA funds. Notwithstanding the aforementioned, the district made no attempt to modify the position to accommodate the applicant's handicaps. The plaintiff was awarded damages under section 504 for loss of earnings and attorney fees.

Ricci v. Okin, 537 F. Supp. 817 (D. Mass. 1982). The court reviewed the reduction in staff at a state institution for retarded which was being operated in accordance with a consent decree. It found that the staff cut of 408 persons proposed by the institution would pose a threat to the clients, although a cut of a lesser degree was allowed.

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FEDERAL REGULATIONS:
PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

34 CFR PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

(As amended through March 11, 1993)*

***This material was placed on disc for NOLPE by Joan Christensen, Stephanie Gordon, Kathy Dye Spaller, Dixie Snow Huefner, and Stephen B. Thomas.**

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Authority: 20 U.S.C. §§ 1411-1420, unless otherwise noted.

Subpart A—General

Purpose, Applicability, and Regulations That Apply to this Program

§ 300.1 Purpose.

The purpose of this part is—

(a) To ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs;

(b) To ensure that the rights of children with disabilities and their parents are protected;

(c) To assist States and localities to provide for the education of all children with disabilities; and

(d) To assess and ensure the effectiveness of efforts to educate those children.

(Authority: 20 U.S.C. § 1401 Note)

§ 300.2 Applicability to State, local and private agencies.

(a) *States.* This part applies to each State that receives payments under Part B of the Act.

(b) *Public agencies within the State.* The State plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of children with disabilities. These would include:

(1) The State educational agency;

(2) Local educational agencies and intermediate educational units;

(3) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for students with deafness or students with blindness); and

(4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for ensuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency. (See §§ 300.400-300.402)

(Authority: 20 U.S.C. §§ 1412(1), (6); 1413(a); 1413(a)(4)(B))

Note: The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§ 300.3 Regulations that apply.

The following regulations apply to this program:

(a) 34 CFR part 76 (State-Administered Programs) except for §§ 76.780-76.782.

(b) 34 CFR part 77 (Definitions).

(c) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(d) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(e) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(f) 34 CFR part 82 (New Restrictions on Lobbying).

(g) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for a Drug-Free Workplace (Grants)).

(h) 34 CFR part 86 (Drug-Free Schools and Campuses).

(i) The regulations in this part—34 CFR part 300 (Assistance to States for Education of Children with Disabilities).

(Authority: 20 U.S.C. § 1221e-3(a)(1))

Definitions

Note 1: Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections in which they are defined:

Appropriate professional requirements in the State (§ 300.153 (a)(1))
Average per pupil expenditure in public elementary and secondary schools in the United States (§ 300.701(c))
Consent (§ 300.500)
Destruction (§ 300.560)
Direct services (§ 300.370(b)(1))
Education records (§ 300.560)
Evaluation (§ 300.500)
First priority children (§ 300.320(a))
Highest requirements in the State applicable to a specific profession or discipline (§ 300.153 (a)(2))
Independent educational evaluation (§ 300.503 (a)(3)(i))
Individualized education program (§ 300.340)
Participating agency, as used in the IEP requirements in §§ 300.346 and 300.347 (§ 300.340(b))
Participating agency, as used in the confidentiality requirements in §§ 300.560-300.576 (§ 300.560)
Party or parties (§ 300.584(a))
Personally identifiable (§ 300.500)
Private school children with disabilities (§ 300.450)
Profession or discipline (§ 300.153(a)(3))
Public expense (§ 300.503(a)(3)(ii))
Second priority children (§ 300.320(b))
Special definition of "State" (§ 300.700)
State-approved or recognized certification, licensing, registration, or other comparable requirements (§ 300.153(a)(4))
Support services (§ 300.370(b)(2))

Note 2: Below are abbreviations for selected terms that are used throughout these regulations:
"FAPE" means "free appropriate public education."
"IEP" means "individualized education program."
"IEU" means "intermediate educational unit."
"LEA" means "local educational agency."
"LRE" means "least restrictive environment."
"SEA" means "State educational agency."

As appropriate, each abbreviation is used interchangeably with its nonabbreviated term.

§ 300.4 Act.

As used in this part, "Act" means the Individuals with Disabilities Education Act, formerly the Education of the Handicapped Act.

(Authority: 20 U.S.C. § 1400)

§ 300.5 Assistive technology device.

As used in this part, "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of children with disabilities.

(Authority: 20 U.S.C. § 1401(a)(25))

§ 300.6 Assistive technology service.

As used in this part, "assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes—

(a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;

(b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

(c) Selecting, designing, fitting, customizing, adapting, applying, retaining, repairing, or replacing assistive technology devices;

(d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(e) Training or technical assistance for a child with a disability or, if appropriate, that child's family; and

(f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of children with disabilities.

(Authority: 20 U.S.C. § 1401(a)(26))

Note: The definitions of "assistive technology device" and "assistive technology service" used in this part are taken directly from section 602(a)(25)-(26) of the Act, but in accordance with Part B, the statutory reference to "individual with a disability" has been replaced with "child with a disability." The Act's definitions of "assistive technology device" and "assistive technology service" incorporate verbatim the definitions of these terms used in the Technology-Related Assistance for Individuals with Disabilities Act of 1988.

§ 300.7 Children with disabilities.

(a)(1) As used in this part, the term "children with disabilities" means those children evaluated in accordance with §§ 300.530-300.534 as having mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities, and who because of those impairments need special education and related services.

(2) The term "children with disabilities" for children aged 3 through 5 may, at a State's discretion, include children—

(i) Who are experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(ii) Who, for that reason, need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Autism" means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has a serious emotional disturbance, as defined in paragraph (b)(9) of this section.

(2) "Deaf-blindness" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) "Deafness" means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance.

(4) "Hearing impairment" means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

(5) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance.

(6) "Multiple disabilities" means concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blindness.

(7) "Orthopedic impairment" means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(8) "Other health impairment" means having limited strength, vitality, or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes that adversely affects a child's educational performance.

(9) "Serious emotional disturbance" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance—

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have a serious emotional disturbance.

(10) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not apply to children who have learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(11) "Speech or language impairment" means a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment that adversely affects a child's educational performance.

(12) "Traumatic brain injury" means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or brain injuries induced by birth trauma.

(13) "Visual impairment including blindness" means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

(Authority: 20 U.S.C. § 1401(a)(1))

Note: If a child manifests characteristics of the disability category "autism" after age 3, that child still could be diagnosed as having "autism" if the criteria in paragraph (b)(1) of this section are satisfied.

§ 300.8 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services that—

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part;

(c) Include preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an IEP that meets the requirements of §§ 300.340-300.350.

(Authority: 20 U.S.C. § 1401(a)(18))

§ 300.9 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(Authority: 20 U.S.C. § 1417(b))

§ 300.10 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than an LEA, that—

(a) Is under the general supervision of an SEA;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to children with disabilities within that State.

(Authority: 20 U.S.C. § 1401 (a)(23))

§ 300.11 Local educational agency.

(a) [Reserved]

(b) For the purposes of this part, the term "local educational agency" also includes intermediate educational units.

(Authority: 20 U.S.C. § 1401 (a)(8))

§ 300.12 Native language.

As used in this part, the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

> The term "native language" when used with reference to an individual of limited English proficiency, means the language normally used by that individual, or in the case of a child, the language normally used by the parents of the child.

(Authority: 20 U.S.C. §§ 3283 (a)(2); 1401(a)(22))

Note: Section 602(a)(22) of the Act states that the term "native language" has the same meaning as the definition from section 703(a)(2) of the Bilingual Education Act. (The term is used in the prior notice and evaluation sections under § 300.505(b)(2) and § 300.532(a)(1).) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) For individuals with deafness or blindness, or for individuals with no written language, the mode of communication would be that normally used by the individual (such as sign language, braille, or oral communication).

§ 300.13 Parent.

As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 300.514. The term does not include the State if the child is a ward of the State.

(Authority: 20 U.S.C. § 1415)

Note: The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

§ 300.14 Public agency.

As used in this part, the term "public agency" includes the SEA, LEAs, IEUs, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

(Authority: 20 U.S.C. §§ 1412(2)(B); 1412(6); 1413(a))

§ 300.15 Qualified

As used in this part, the term "qualified" means that a person has met SEA approved or recognized certification, licensing, registration, or other comparable requirements that apply to the area in which he or she is providing special education or related services.

(Authority: 20 U.S.C. § 1417(b))

§ 300.16 Related Services

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes—

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing.

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification and assessment of disabilities in children" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(5) "Occupational therapy" includes—

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" includes—

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions related to learning.

(iv) Consulting with other staff members in planning school programs to meet the needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes—

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "Rehabilitation counseling services" means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to students with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended.

(11) "School health services" means services provided by a qualified school nurse or other qualified person.

(12) "Social work services in schools" includes—

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program.

(13) "Speech pathology" includes—

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(14) "Transportation" includes—

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(Authority: 20 U.S.C. § 1401(a)(17))

Note: With respect to related services, the Senate Report states:

> The Committee bill provides a definition of related services, making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(S. Rep. No. 94-166, p. 12 (1975))

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a child with a disability to benefit from special education.

There are certain kinds of services that might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors, and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administration and supervisory activities that are necessary for program planning, management, and evaluation.

§ 300.17 Special education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, and is considered special education rather than a related service under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adaptive physical education, movement education, and motor development.

(Authority: 20 U.S.C. § 1401(a)(16))

(3) *Vocational education* means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(Authority: 20 U.S.C. § 1401(16))

Note 1: The definition of special education is a particularly important one under these regulations, since a child does not have a disability under this part unless he or she needs special education. (See the definition of children with disabilities in § 300.7.) The definition of related services (§ 300.16) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no related services, and the child is not a child with a disability and is, therefore not covered under the Act.

Note 2: The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Public Law 94-482. Under that Act, "vocational education" includes industrial arts and consumer and homemaking education programs.

§ 300.18 Transition services.

(a) As used in this part, "transition services" means a coordinated set of activities for a student, designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.

(b) The coordinated set of activities described in paragraph (a) of this section must

(1) Be based on the individual student's needs, taking into account the student's preferences and interests; and

(2) Include

(i) Instruction;

(ii) Community experiences;

(iii) The development of employment and other post-school adult living objectives; and

(iv) If appropriate, acquisition of daily living skills and functional vocational evaluation.

(Authority: 20 U.S.C. § 1401(a)(19))

Note: Transition services for students with disabilities may be special education, if they are provided as specially designed instruction, or related services, if they are required to assist a student with a disability to benefit from special education. The list of activities in paragraph (b) is not intended to be exhaustive.

Subpart B—State Plans and Local Educational Agency Applications

State Plans—General

§ 300.110 Condition of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit a State plan to the Secretary through its SEA, which plan shall be effective for a period of 3 fiscal years.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1231g, 1412, 1413)

§ 300.111 Content of plan.

Each State plan must contain the provisions required in §§ 300.121-300.154.

(Authority: 20 U.S.C. §§ 1412, 1413)

State Plans—Contents

§ 300.121 Right to a free appropriate public education.

(a) Each State plan must include information that shows that the State has in effect a policy that ensures that all children with disabilities have the right to FAPE within the age ranges and timelines under § 300.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State documents that show the source of the policy.

(c) The information must show that the policy—

(1) Applies to all public agencies in the State;

(2) Applies to all children with disabilities;

(3) Implements the priorities established under §§ 300.320-300.324; and

(4) Establishes timelines for implementing the policy in accordance with § 300.122.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1412(1), (2)(B), (6); 1413(a)(1))

§ 300.122 Timelines and ages for free appropriate public education.

(a) *General.* Each State plan must include in detail the policies and procedures that the State will undertake or has undertaken in order to ensure that FAPE is available for all children with disabilities aged 3 through 18 within the State not later than September 1 1978, and for all children with disabilities aged 3 through 21 within the State not later than September 1, 1980.

(b) *Documents relating to timelines.* Each State plan must include a copy of each State statute, court order, Attorney General decision, and other State documents that demonstrate that the State has established timelines in accordance with paragraph (a) of this section.

(c) *Exception.* The requirement in paragraph (a) of this section does not apply to a State with respect to children with disabilities aged 3, 4, 5, 18, 19, 20, or 21 to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) *Documents relating to exceptions.* Each State plan must—

(1) Describe in detail the extent that the exception in paragraph (c) of this section applies to the State; and

(2) Include a copy of each State law, court order, and other documents that provide a basis for the exception.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(2)(B))

§ 300.123 Full educational opportunity goal.

Each State plan must include in detail the policies and procedures that the State will undertake, or has undertaken, in order to ensure that the State has a goal of providing full educational opportunity to all children with disabilities aged birth through 21.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(2)(A))

§ 300.124 [Reserved]

§ 300.125 Full educational opportunity goal timetable.

Each State plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all children with disabilities.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(2)(A))

§ 300.126 Full educational opportunity goal— facilities, personnel, and services.

Each State plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all children with disabilities.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(2)(A))

§ 300.127 Priorities.

Each State plan must include information that shows that—

(a) The State has established priorities that meet the requirements of §§ 300.320-300.324;

(b) The State priorities meet the timelines under § 300.122; and

(c) The State has made progress in meeting those timelines.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(3))

§ 300.128 Identification, location, and evaluation of children with disabilities.

(a) *General requirement.* Each State plan must include in detail the policies and procedures that the State will undertake, or has undertaken, to ensure that—

(1) All children with disabilities, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each State plan must:

(1) Designate the State agency (if other than the SEA) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section.

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation.

(3) Describe the extent that—

(i) The activities described in paragraph (a) of this section have been achieved under the current State plan; and

(ii) The resources named for these activities in that plan have been used.

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes.

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to ensure that the SEA obtains—

(i) The number of children with disabilities within each disability category that have been identified, located, and evaluated; and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures.

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C § 1412(2)(C))

Note 1: The State is responsible for ensuring that all children with disabilities are identified, located, and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements of §§ 300.560-300.576.

Note 2: Under both Parts B and H of the Act, States are responsible for identifying, locating, and evaluating infants and toddlers from birth through 2 years of age who have disabilities or who are suspected of having disabilities. In States where the SEA and the State's lead agency for the Part H program are different and the Part H lead agency will be participating in the child find activities described in paragraph (a) of this section, the nature and extent of the Part H lead agency's participation must, under paragraph (b)(2) of this section, be included in the State plan. With the SEA's agreement, the Part H lead agency's participation may include the actual implementation of child find activities for infants and toddlers. The use of an interagency agreement or other mechanism for providing for the Part H lead agency's participation would not alter or diminish the responsibility of the SEA to ensure compliance with all child find requirements, including the requirement in paragraph (a)(1) of this section that all children with disabilities who are in need of special education and related services are evaluated.

§ 300.129 Confidentiality of personally identifiable information.

(a) Each State plan must include in detail the policies and procedures that the State will undertake, or has undertaken, in order to ensure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Secretary shall use the criteria in §§ 300.560-300.576 to evaluate the policies and procedures of the State under paragraph (a) of this section.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

Note: The confidentiality regulations were published in the **Federal Register** in final form on February 27, 1976 (41 FR 8603-8610), and met the requirements of Part B of the Act. Those regulations are incorporated in §§ 300.560-300.576.

§ 300.130 Individualized education programs.

(a) Each State plan must include information that shows that each public agency in the State maintains records of the IEP of each child with disabilities, and each public agency establishes, reviews, and revises each program as provided in §§ 300.340-300.350.

(b) Each State plan must include

(1) A copy of each State statute, policy, and standard that regulates the manner in which IEPs are developed, implemented, reviewed, and revised; and

(2) The procedures that the SEA follows in monitoring and evaluating those programs.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1412(4), 1413(a)(1))

§ 300.131 Procedural safeguards.

Each State plan must include procedural safeguards that ensure that the requirements of §§ 300.500-300.514 are met.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(5)(A))

§ 300.132 Least restrictive environment.

(a) Each State plan must include procedures that ensure that the requirements of §§ 300.550-300.556 are met.

(b) Each State plan must include the following information:

(1) The number of children with disabilities in the State, within each disability category, who are participating in regular education programs, consistent with §§ 300.550-300.556.

(2) The number of children with disabilities who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(5)(B))

§ 300.133 Protection in evaluation procedures.

Each State plan must include procedures that ensure that the requirements of §§ 300.530-300.534 are met.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(5)(C))

§ 300.134 Responsibility of State educational agency for all educational programs.

(a) Each State plan must include information that shows that the requirements of § 300.600 are met.

(b) The information under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other documents that show compliance with that paragraph.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(6))

§ 300.135 [Reserved]

§ 300.136 Implementation procedures—State educational agency.

Each State plan must describe the procedures the SEA follows to inform each public agency of its responsibility for ensuring effective implementation of procedural safeguards for the children with disabilities served by that public agency.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(6))

§ 300.137 Procedures for consultation.

Each State plan must include an assurance that in carrying out the requirements of section 612 of the Act, procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents of children with disabilities.

(Authority: 20 U.S.C. § 1412(7)(A))

§ 300.138 Other Federal programs.

Each State plan must provide that programs and procedures are established to ensure that funds received by the State or any public agency in the State under any other Federal program, including subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965, under which there is specific authority for assistance for the education of children with disabilities, are used by the State, or any public agency in the State, only in a manner consistent with the goal of providing FAPE for all children with disabilities, except that nothing in this section limits the specific requirements of the laws governing those Federal programs.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(2))

§ 300.139 Comprehensive system of personnel development.

Each State plan must include the procedures required under §§ 300.380-300.383.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(3))

§ 300.140 Private schools.

Each State plan must include policies and procedures that ensure that the requirements of §§ 300.400-300.403 and §§ 300.450-300.452 are met.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(4))

§ 300.141 Recovery of funds for misclassified children.

Each State plan must include policies and procedures that ensure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(5))

§§ 300.142-300.143 [Reserved]

§ 300.144 Hearing on application.

Each State plan must include procedures to ensure that the SEA does not take any final action with respect to an application submitted by an LEA before giving the LEA reasonable notice and an opportunity for a hearing under § 76.401(d) of this title.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(8))

§ 300.145 Prohibition of commingling.

Each State plan must provide assurance satisfactory to the Secretary that funds provided under part B of the Act are not commingled with State funds.

(Authority: 20 U.S.C. § 1413(a)(9))

Note: This assurance is satisfied by the use of a separate accounting system that includes an audit trail of the expenditure of the part B funds. Separate bank accounts are not required. (See 34 CFR 76.702 (Fiscal control and fund accounting procedures).)

§ 300.146 Annual evaluation.

Each State plan must include procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of children with disabilities, including evaluation of IEPs.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(11))

§ 300.147 State advisory panel.

Each State plan must provide that the requirements of §§ 300.650-300.653 are met.

(Authority: 20 U.S.C. § 1413(a)(12))

§ 300.148 Policies and procedures for use of Part B funds.

Each State plan must set forth policies and procedures designed to ensure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B, with particular attention given to sections 611(b), 611(c), 611(d), 612(2) and 612(3) of the Act.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(1))

§ 300.149 Description of use of Part B funds.

(a) State allocation. Each State plan must include the following information about the State's use of funds under § 300.370 and § 300.620:

(1) A list of administrative positions, and a description of duties for each person whose salary is paid in whole of in part with those funds.

(2) For each position, the percentage of salary paid with those funds.

(3) A description of each administrative activity the SEA will carry out during the next school year with those funds.

(4) A description of each direct service and each support service that the SEA will provide during the next period covered by the State plan with those funds, and the activities the State advisory panel will undertake during that period with those funds.

(b) Local educational agency allocation. Each State plan must include—

(1) As estimate of the number and percent of LEAs in the State that will receive an allocation under this part (other than LEAs that submit a consolidated application);

(2) An estimate of the number of LEAs that will receive an allocation under a consolidated application;

(3) An estimate of the number of consolidated applications and the average number of LEAs per application; and

(4) A description of direct services that the SEA will provide under § 300.360.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(6))

§ 300.150 State-level nonsupplanting.

Each State plan must provide assurance satisfactory to the Secretary that funds provided under this part will be used so as to supplement and increase the level of Federal (other than funds available under this part), State, and local funds—including funds that are not under the direct control of the SEA or LEAs—expended for special education and related services provided to children with disabilities under this part and in no case to supplant those Federal (other that funds available under this part), State, and local funds unless a waiver is granted in accordance with § 300.589.

(Authority: 20 U.S.C. § 1413(a)(9))

Note: This requirement is distinct from the LEA nonsupplanting provision already contained in these regulations at § 300.230. Under this State-level provision, the State must assure that Part B funds distributed to LEAs and IEUs will be used to supplement and not supplant other Federal, State, and local funds (including funds not under the control of educational agencies) that would have been expended for special education and related services provided to children with disabilities in the absence of the Part B funds. The portion of Part B funds that are not distributed to LEAs or IEUs under the statutory formula (20 U.S.C. § 1411(d)) are not subject to this nonsupplanting provision. See 20 U.S.C. § 1411(c)(3). States may not permit LEAs or IEUs to use Part B funds to satisfy a financial commitment for services that would have been paid for by a health or other agency pursuant to policy or practice but for the fact that these services are now included in the IEPs of children with disabilities.

(H.R. Rep. No. 860, 99th Cong., 21-22 (1986))

§ 300.151 Additional information if the State educational agency provides direct services.

If an SEA provides FAPE for children with disabilities or provides them with direct services, its State plan must include the information required under §§ 300.226, 300.227, 300.231, and 300.235.

(Authority: 20 U.S.C. § 1413(b))

§ 300.152 Interagency agreements.

(a) Each State plan must set forth policies and procedures for developing and implementing interagency agreements between—

(1) The SEA; and

(2) All other State and local agencies that provide or pay for services required under this part for children with disabilities.

(b) The policies and procedures referred to in paragraph (a) of this section must—

(1) Describe the role that each of those agencies plays in providing or paying for services required under this part for children with disabilities; and

(2) Provide for the development and implementation of interagency agreements that—

(i) Define the financial responsibility of each agency for providing children with disabilities with FAPE;

(ii) Establish procedures for resolving interagency disputes among agencies that are parties to the agreements; and

(iii) Establish procedures under which LEAs may initiate proceedings in order to secure reimbursement from agencies that are parties to the agreements or otherwise implement the provisions of the agreements.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(13))

§ 300.153 Personnel standards.

(a) As used in this part:

(1) "Appropriate professional requirements in the State" means entry level requirements that—

(i) Are based on the highest requirements in the State applicable to the profession or discipline in which a person is providing special education or related services; and

(ii) Establish suitable qualifications for personnel providing special education and related services under this part to children and youth with disabilities who are served by State, local, and private agencies (see § 300.2).

(2) "Highest requirements in the State applicable to a specific profession or discipline" means the highest entry-level academic degree needed for any State approved or recognized certification, licensing, registration, or other comparable requirements that apply to that profession or discipline.

(3) "Profession or discipline" means a specific occupational category that—

(i) Provides special education and related services to children with disabilities under this part;

(ii) Has been established or designated by the State; and

(iii) Has a required scope of responsibility and degree of supervision.

(4) "State approved or recognized certification, licensing, registration, or other comparable requirements" means the requirements that a State legislature either has enacted or has authorized a State agency to promulgate through rules to establish the entry-level standards for employment in a specific profession or discipline in that State.

(b)(1) Each State plan must include policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

(2) The policies and procedures required in paragraph (b)(1) of this section must provide for the establishment and maintenance of standards that are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services.

(c) To the extent that a State's standards for a profession or discipline, including standards for temporary or emergency certification, are not based on the highest requirements in the State applicable to a specific profession or discipline, the State plan must include the steps the State is taking and the procedures for notifying public agencies and personnel of those steps and the timelines it has established for the retraining or hiring of personnel to meet appropriate professional requirements in the State.

(d)(1) In meeting the requirements in paragraphs (b) and (c) of this section, a determination must be made about the status of personnel standards in the State. That determination must be based on current information that accurately describes, for each profession or discipline in which personnel are providing special education or related services, whether the applicable standards are consistent with the highest requirements in the State for that profession or discipline.

(2) The information required in paragraph (d)(1) of this section must be on file in the SEA, and available to the public.

(e) In identifying the highest requirements in the State for purposes of this section, the requirements of all State statutes and the rules of all State agencies applicable to serving children and youth with disabilities must be considered.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(14))

Note: The regulations require that the State use its own existing highest requirements to determine the standards appropriate to personnel who provide special education and related services under this part. The regulations do not require States to set any specified training standard, such as a master's degree, for employment of personnel who provide services under this part. In some instances, States will be required to show that they are taking steps to retrain or to hire personnel to meet the standards adopted by the SEA that are based on requirements for practice in a specific profession or discipline that were established by other State agencies. States in this position need not, however, require personnel providing services under this part to apply for and obtain the license, registration, or other comparable credential required by other agencies of individuals in that profession or discipline. The regulations permit each State to determine the specific occupational categories required to provide special education and related services and to revise or expand these categories as needed. The professions or disciplines defined by the State need not be limited to traditional occupational categories.

§ 300.154 Transition of individuals from Part H to Part B.

Each State plan must set forth policies and procedures relating to the smooth transition for those individuals participating in the early intervention program under Part H of the Act who will participate in preschool programs assisted under this part, including a method of ensuring that when a child turns age 3 an IEP, or, if consistent with sections 614(a)(5) and 677(d) of the Act, an individualized family service plan, has been developed and implemented by the child's third birthday.

(Authority: 20 U.S.C. § 1413(a)(15))

Local Educational Agency Applications—General

§ 300.180 Submission of application.

In order to receive payments under Part B of the Act for any fiscal year, an LEA must submit an application to the SEA.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414 (a))

§ 300.181 [Reserved]

§ 300.182 The excess cost requirement.

An LEA may only use funds under part B of the Act for the excess costs of providing special education and related services for children with disabilities.

(Authority: 20 U.S.C. § 1414(a)(1), (a)(2)(B)(i))

§ 300.183 Meeting the excess cost requirements.

(a) An LEA meets the excess cost requirement if it has on the average spent at least the amount determined under § 300.184 for the education of each of its children with disabilities. This amount may not include capital outlay or debt service.

(Authority: 20 U.S.C. §§ 1402(20); 1414(a)(1))

Note: The excess cost requirement means that the LEA must spend a certain minimum amount for the education of its children with disabilities before part B funds are used. This ensures that children served with part B funds have at least the same average amount spent of them, from sources other than part B, as do the children in the school district taken as a whole.

The minimum amount that must be spent for the education of children with disabilities is computed under a statutory formula. Section 300.184 implements this formula and gives a step-by-step method to determine the minimum amount. Excess costs are those costs of special education and related services that exceed the minimum amount. Therefore, if an LEA can show that it has (on the average) spent the minimum amount for the education of each of its children with disabilities, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs, subject to the other requirements of part B (priorities, etc.). In the Note under § 300.184 there is an example of how the minimum amount is computed.

§ 300.184 Excess costs—computation of minimum amount.

The minimum-average amount that an LEA must spend under § 300.183 for the education of each of its children with disabilities is computed as follows:

(a) Add all expenditures of the LEA in the preceding school year, except capital outlay and debt service—

(1) For elementary school students, if the child with a disability is an elementary school student; or

(2) For secondary school students, if the child with a disability is a secondary school student.

(b) From this amount, subtract the total of the following amounts spent for elementary school students or for secondary school students, as the case may be—

(1) Amounts the agency spent in the preceding school year from funds awarded under part B of the Act and titles I and VII of the Elementary and Secondary Education Act of 1965; and

(2) Amounts from State and local funds that the agency spent in the preceding school year for—

(i) Programs for children with disabilities;

(ii) Programs to meet the special educational needs of educationally deprived children; and

(iii) Programs of bilingual education for limited English proficient children.

(c) Divide the result under paragraph (b) of this section by the average number of students enrolled in the agency in the preceding school year—

(1) In its elementary school, if the child with a disability is an elementary school student; or

(2) In its secondary schools, if the child with a disability is a secondary school student.

(Authority: 20 U.S.C. § 1414(a)(1))

Note: The following is an example of how an LEA might compute the average minimum amount it must spend for the education of each of its children with disabilities, under § 300.183. This example follows the formula in § 300.184. Under the statute and regulations, the LEA must make one computation for children with disabilities in its elementary schools and a separate computation for children with disabilities in its secondary schools. The computation for elementary school students with disabilities would be done as follows:

a. First, the LEA must determine its total amount of expenditures for elementary school students from all sources—local, State, and Federal (including part B)—in the preceding school year. Only capital outlay and debt service are excluded.

Example: An LEA spent the following amounts last year for elementary school students (including its elementary school students with disabilities):

(1) From local tax funds	$2,750,000
(2) From State funds	7,000,000
(3) From Federal funds	750,000
10,500,000	

Of this total, $500,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures:

$10,500,000
-500,000

Total expenditures for elementary school students (less capital outlay and debt service) 10,000,000

b. Next, the LEA must subtract amounts spent for:

(1) Programs for children with disabilities;

(2) Programs to meet the special educational needs of educationally deprived children; and

(3) Programs of bilingual education for limited English proficient children.

These are funds that the LEA actually spent, not funds received last year but carried over for the current school year.

Example: The LEA spent the following amounts for elementary school students last year:

(1) From funds under Chapter 1 of title I of the Elementary and Secondary Education Act of 1965	300,000
(2) From a special State program for educationally deprived children	200,000
(3) From a grant under Part B	200,000
(4) From State funds for the education of children with disabilities	500,000
(5) From a locally-funded program for children with disabilities	250,000
(6) From a grant for a bilingual education program under Title VII of the Elementary and Secondary Education Act of 1965	150,000
Total	1,600,000

(An LEA would also include any other funds it spent from Federal, State, or local sources for the three basic purposes: Children with disabilities, educationally deprived children, and bilingual education for limited English proficient children.)

This amount is subtracted from the LEA's total expenditure for elementary school students computed above:

$10,000,000
1,600,000
8,400,000

c. The LEA next must divide by the average number of students enrolled in the elementary schools of the agency last year (including its students with disabilities).

Example: Last year, an average of 7,000 students were enrolled in the agency's elementary schools. This must be divided into the amount computed under the above paragraph: $8,400,000/7,000 students = $1,200/student.

This figure is in the minimum amount the LEA must spend (on the average) for the education of each of its students with disabilities. Funds under Part B may be used only for costs over and above this minimum. In this example, if the LEA has 100 elementary school students with disabilities, it must keep records adequate to show that it has spent at least $120,000 for the education of those students

(100 students times $1,200/student), not including capital outlay and debt service.

This $120,000 may come from any funds except funds under Part B, subject to any legal requirements that govern the use of those other funds.

If the LEA has secondary school students with disabilities, it must do the same computation for them. However the amounts used in the computation would be those the LEA spent last year for the education of secondary school students, rather than for elementary school students.

§ 300.185 Computation of excess costs—consolidated application.

The minimum average amount under § 300.183, if two or more LEAs submit a consolidated application, is the average of the combined minimum average amounts determined under § 300.184 in those agencies for elementary or secondary school students, as the case may be.

(Authority: 20 U.S.C. § 1414(a)(1))

§ 300.186 Excess costs—limitation on use of Part B funds.

(a) The excess cost requirement prevents an LEA from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a child with a disability, subject to paragraph (b) of this section.

(b) The excess cost requirement does not prevent an LEA from using Part B funds to pay for all of the costs directly attributable to the education of a child with a disability in any of the age ranges three, four, five eighteen, nineteen, twenty, or twenty-one, if no local or State funds are available for nondisabled children in that age range. However, the LEA must comply with the nonsupplanting and other requirements of this part in providing the education and services.

(Authority: 20 U.S.C. §§ 1402(20); 1414(a)(1))

§§ 300.187-300.189 [Reserved]

§ 300.190 Consolidated applications.

(a) [Reserved]

(b) *Required applications.* An SEA may require LEAs to submit a consolidated application for payments under Part B of the Act if the SEA determines that an individual application submitted by an LEA will be disapproved because—

(1) The agency's entitlement is less than the $7,500 minimum required by section 611(c)(4)(A)(i) of the Act (§ 300.360(a)(1)); or

(2) The agency is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of children with disabilities.

(c) *Size and scope of program.* The SEA shall establish standards and procedures for determinations under paragraph (b)(2) of this section.

(Authority: 20 U.S.C. § 1414(c)(1))

§ 300.191 [Reserved]

§ 300.192 State regulation of consolidated applications.

(a) The SEA shall issue regulations with respect to consolidated applications submitted under this part.

(b) The SEA's regulations must—

(1) Be consistent with sections 612(1)-(7) and 613(a) of the Act; and

(2) Provide participating LEAs with joint responsibilities for implementing programs receiving payments under this part.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(c)(2)(B))

(c) If an IEU is required by State law to carry out this part, the joint responsibilities given to LEAs under paragraph (b)(2) of this section do not apply to the administration and disbursement of any payments received by the IEU. Those administrative responsibilities must be carried out exclusively by the IEU.

(Authority: 20 U.S.C. § 1414(c)(2)(C))

§ 300.193 State educational agency approval; disapproval.

(a)-(b) [Reserved]

(c) In carrying out its functions under this section, each SEA shall consider any decision resulting from a hearing under §§ 300.506-300.513 that is adverse to the LEA involved in the decision.

(Authority: 20 U.S.C. § 1414(b)(3))

§ 300.194 Withholding.

(a) If an SEA, after giving reasonable notice and an opportunity for a hearing to an LEA, decides that the LEA in the administration of an application approved by the SEA has failed to comply with any requirement in the application, the SEA, after giving notice to the LEA, shall—

(1) Make no further payments to the LEA until the SEA is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the LEA under § 300.180; or

(3) Both.

(b) [Reserved]

(Authority: 20 U.S.C. § 1414(b)(2))

Local Educational Agency Applications—Contents

§ 300.220 Child Identification.

Each application must include procedures that ensure that all children residing within the jurisdiction of the LEA who have disabilities, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated, including a practical method for determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(A))

Note: The LEA is responsible for ensuring that all children with disabilities within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction. Collection and use of data are subject to the confidentiality requirements of §§ 300.560-300.576.

§ 300.221 Confidentiality of personally identifiable information.

Each application must include policies and procedures that ensure that the criteria in §§ 300.560-300.574 are met.

(Authority: 20 U.S.C. § 1414(a)(1)(B))

§ 300.222 Full educational opportunity goal timetable.

Each application must—(a) Include a goal of providing full educational opportunity to all children with disabilities, aged birth through 21; and

(b) Include a detailed timetable for accomplishing the goal.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(C),(D))

§ 300.223 Facilities, personnel, and services.

Each application must provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal in § 300.222.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(E))

§ 300.224 Personnel development.

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the SEA under § 300.139.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(C)(i))

§ 300.225 Priorities.

Each application must include priorities that meet the requirements of §§ 300.320-300.324.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(C)(ii))

§ 300.226 Parent involvement.

Each application must include procedures to ensure that, in meeting the goal under § 300.222, the LEA makes provision for participation of and consultation with parents or guardians of children with disabilities.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(C)(iii))

§ 300.227 Participation in regular education programs.

(a) Each application must include procedures to ensure that to the maximum extent practicable, and consistent with §§ 300.550-300.553, the LEA provides special services to enable children with disabilities to participate in regular educational programs.

(b) Each application must describe (1) The types of alternative placements that are available for children with disabilities; and

(2) The number of children with disabilities within each disability category who are served in each type of placement.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(C)(iv))

§ 300.228 [Reserved]

§ 300.229 Excess cost.

Each application must provide assurance satisfactory to the SEA that the LEA uses funds provided under part B of the Act only for costs that exceed the amount computed under § 300.184 and that are directly attributable to the education of children with disabilities.

(Authority: 20 U.S.C. § 1414(a)(2)(B))

§ 300.230 Nonsupplanting.

(a) Each application must provide assurance satisfactory to the SEA that the LEA uses funds provided under part B of the Act to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of children with disabilities, and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section, the total amount or average per capita amount of State and local school funds budgeted by the LEA for expenditures in the current fiscal year for the education of children with disabilities must be at least equal to the total amount or average per capita amount of State and local school funds actually expended for the education of children with disabilities in the most recent preceding fiscal year for which the information is available. Allowance may be made for—

(1) Decreases in enrollment of children with disabilities; and

(2) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of school facilities.

(Authority: 20 U.S.C. § 1414(a)(2)(B))

§ 300.231 Comparable services.

(a) Each application must provide assurance satisfactory to the SEA that the LEA meets the requirements of this section.

(b) An LEA may not use funds under part B of the Act to provide services to children with disabilities unless the LEA uses State and local funds to provide services to those children that, taken as a whole, are at least comparable to services provided to other children with disabilities in that LEA.

(c) Each LEA shall maintain records that show that the LEA meets the requirement in paragraph (b) of this section.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(2)(C))

Note: Under the "comparability" requirement, if State and local funds are used to provide certain services, those services must be provided with State and local funds to all children with disabilities in the LEA who need them. Part B funds may then be used to supplement existing services, or to provide additional services to meet special needs. This, of course, is subject to the other requirements of the Act, including the priorities under §§ 300.320-300.324.

§§ 300.232-300.234 [Reserved]

§ 300.235 Individualized education programs.

Each application must include procedures to assure that the LEA complies with §§ 300.340-300.350.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(5))

§ 300.236 [Reserved]

§ 300.237 Procedural safeguards.

Each application must provide assurance satisfactory to the SEA that the LEA has procedural safeguards that meet the requirements of §§ 300.500-300.515.

(Authority: 20 U.S.C. § 1414(a)(7))

§ 300.238 Use of Part B funds.

Each application must describe how the LEA will use the funds under part B of the Act during the next school year.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a))

§ 300.239 [Reserved]

§ 300.240 Other requirements.

Each local application must include additional procedures and information that the SEA may require in order to meet the State plan requirements of §§ 300.121-300.153.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(6))

Application From Secretary of the Interior

§ 300.260 Submission of application; approval.

(a) In order to receive a grant under this part, the Secretary of the Interior shall submit an application that—

(1) Meets the requirements of section 612(1), 612(2)(C)-(E), 612(4), 612(5), 612(6), and 612(7) of the Act (including monitoring and evaluation activities);

(2) Meets the requirements of section 613(a), (2), (3), (4)(B), (5), (6), (7), (10), (11), (12), (13), (14),, and (15), 613(b), and 613(e) of the Act;

(3) Meets the requirements of section 614(a)(1)(A)-(B), (2)(A), (C), (3), (4), (5), and (7) of the Act;

(4) Meets the requirements of this part that implement the sections of the Act listed in paragraphs (a)(1)-(3) of this section.

(5) Includes a description of how the Secretary of the Interior will coordinate the provision of services under this part with LEAs, tribes and tribal organizations, and other private and Federal service providers;

(6) Includes an assurance that there are public hearings, adequate notice of such hearings, and an opportunity for comment afforded to members of tribes, tribal governing bodies, and affected local school boards before the adoption of the policies, programs, and procedures required under paragraphs (a)(1)-(3) of this section;

(7) Includes an assurance that the Secretary of the Interior will provide such information as the Secretary may require to comply with section 618(b)(1) of the Act, including data on the number of children and youth with disabilities served and the types and amounts of services provided and needed;

(8) Includes an assurance that, by October 1, 1992, the Secretaries of the Interior and Health and Human Services will enter into a memorandum of agreement, to be provided to the Secretary, for the coordination of services, resources, and personnel between their respective Federal, State, and local offices and with SEAs and LEAs and other entities to facilitate the provision of services to Indian children with disabilities residing on or near reservations. That agreement must provide for the apportionment of responsibilities and costs, including but not limited to, those related to child find, evaluation, diagnosis, remediation or therapeutic measures, and (where appropriate) equipment and medical or personal supplies, or both, as needed for a child to remain in school or a program; and

(9) Includes an assurance that the Department of the Interior will cooperate with the Department of Education in the latter's exercise of monitoring and oversight of this application, and any agreements entered into between the Secretary of the Interior and other entities under the Act and will fulfill its duties under the Act.

(b) Sections 300.581-300.585 apply to grants available to the Secretary of the Interior under this part.

(Authority: 20 U.S.C. § 1411(f))

§ 300.261 Public participation.

In the development of the application for the Department of the Interior, the Secretary of the Interior shall provide for public participation consistent with §§ 300.280-300.284.

(Authority: 20 U.S.C. § 1411(f))

§ 300.262 Use of Part B funds.

(a)(1) The Department of the Interior may use five percent of its payment under § 300.709 in any fiscal year, or $350,000, whichever is greater, for administrative costs in carrying out the provisions of this part.

(2) The remainder of the payments to the Secretary of the Interior under § 300.709 in any fiscal year must be used in accordance with the priorities under §§ 300.320-300.324.

(b) Payments to the Secretary of the Interior under § 300.710 must be used in accordance with that section.

(Authority: 20 U.S.C. § 1411(f))

§ 300.263 Applicable regulations.

The Secretary of the Interior shall comply with requirements of §§ 300.301-300.303, §§ 300.305-300.307, and §§ 300.340-300.347, § 300.350, §§300.360-300.383, §§ 300.400-300.402, §§ 300.500-300.585, §§ 300.600-300.621, and §§ 300.660-300.662.

(Authority: 20 U.S.C. § 1411(f)(2))

Public Participation

§ 300.280 Public hearings before adopting a State plan.

Prior to its adoption of a State plan, the SEA shall

(a) Make the plan available to the general public;

(b) Hold public hearings; and

(c) Provide an opportunity for comment by the general public on the plan.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1412(7))

§ 300.281 Notice.

(a) The SEA shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the general public about

(1) The purpose and scope of the State plan and its relation to part B of the Act;

(2) The availability of the State plan;

(3) The date, time, and location of each public hearing;

(4) The procedures for submitting written comments about the plan; and

(5) The timetable for developing the final plan and submitting it to the Secretary for approval.

(c) The notice must be published or announced

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings; and

(2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1412(7))

§ 300.282 Opportunity to participate; comment period.

(a) The SEA shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The plan must be available for comment for a period of at least 30 days following the date of the notice under § 300.281.

(Authority: 20 U.S.C. § 1412(7))

§ 300.283 Review of public comments before adopting plan.

Before adopting its State plan, the SEA shall

(a) Review and consider all public comments; and

(b) Make any necessary modifications in the plan.

(Authority: 20 U.S.C. § 1412(7))

§ 300.284 Publication and availability of approved plan.

After the Secretary approves a State plan, the SEA shall give notice in newspapers or other media, or both, that the plan is approved. The notice must name places throughout the State where the plan is available for access by any interested person.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1412(7))

Subpart C—Services

Free Appropriate Public Education

§ 300.300 Timelines for free appropriate public education.

(a) *General.* Each State shall ensure that FAPE is available to all children with disabilities aged 3 through 18 within the State not later than September 1, 1978, and to all children with disabilities aged 3 through 21 within the State not later than September 1, 1980.

(b) *Age ranges 3-5 and 18-21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to children with disabilities aged 3, 4, 5, 18, 19, 20, and 21:

(1) If State law or a court order requires the State to provide education for children with disabilities in any disability category in any of these age groups, the State must make FAPE available to all children with disabilities of the same age who have that disability.

(2) If a public agency provides education to nondisabled children in any of these age groups, it must make FAPE available to at least a proportionate number of children with disabilities of the same age.

(3) If a public agency provides education to 50 percent or more of its children with disabilities in any disability category in any of these age groups, it must make FAPE available to all its children with

disabilities of the same age who have that disability. This provision does not apply to children aged 3 through 5 for any fiscal year for which the State receives a grant under section 619(a)(1) of the Act.

(4) If a public agency provides education to a child with a disability in any of these age groups, it must make FAPE available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(5) A State is not required to make FAPE available to a child with a disability in one of these age groups if—

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to nondisabled children in that age group; or

(ii) The requirement is inconsistent with a court order that governs the provision of free public education to children with disabilities in that State.

(c) *Children aged 3 through 21 on reservations.* With the exception of children identified in § 300.709(a)(1) and (2), the SEA shall be responsible for ensuring that all of the requirements of Part B of the Act are implemented for all children aged 3 through 21 on reservations.

(Authority: 20 U.S.C. §§ 1411(f); 1412(2)(B); S. Rep. No. 94-168, p. 19 (1975))

Note 1: The requirement to make FAPE available applies to all children with disabilities within the State who are in the age ranges required under § 300.300 and who need special education and related services. This includes children with disabilities already in school and children with less severe disabilities, who are not covered under the priorities under § 300.321.

Note 2: In order to be in compliance with § 300.300, each State must ensure that the requirement to identify, locate, and evaluate all children with disabilities is fully implemented by public agencies throughout the State. This means that before September 1, 1978, every child who has been referred or is on a waiting list for evaluation (including children in school as well as those not receiving an education) must be evaluated in accordance with §§ 300.530-300.533. If, as a result of the evaluation, it is determined that a child needs special education and related services, an IEP must be developed for the child by September 1, 1978, and all other applicable requirements of this part must be met.

Note 3: The requirement to identify, locate, and evaluate children with disabilities (commonly referred to as the "child find system") was enacted on August 21, 1974, under Pub. L. 93-380. While each State needed time to establish and implement its child find system, the four year period between August 21, 1974, and September 1, 1978, is considered to be sufficient to ensure that the system is fully operational and effective on a State-wide basis.

Under the statute, the age range for the child find requirement (0-21) is greater than the mandated age range for providing FAPE. One reason for the broader age requirement under "child find" is to enable States to be aware of and plan for younger children who will require special education and related services. It also ties in with the full educational opportunity goal requirement that has the same age range as child find. Moreover, while a State is not required to provide FAPE to children with disabilities below the age ranges mandated under § 300.300, the State may, at its discretion, extend services to those children, subject to the priority requirements of §§ 300.320-300.324.

§ 300.301 Free appropriate public education—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a child with a disability in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a child with a disability.

(Authority: 20 U.S.C. §§ 1401 (18); 1412(2)(B))

§ 300.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(Authority: 20 U.S.C. §§ 1412(2)(B); 1413(a)(4)(B))

Note: This requirement applies to placements that are made by public agencies for educational purposes, and includes placements in State-operated schools for children with disabilities, such as a State school for students with deafness or students with blindness.

§ 300.303 Proper functioning of hearing aids.

Each public agency shall ensure that the hearing aids worn by children with hearing impairments including deafness in school are functioning properly.

(Authority: 20 U.S.C. § 1412(2)(B))

Note: The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services.

(Authority: H.R. Rep. No. 95-381, p. 67 (1977))

§ 300.304 Full educational opportunity goal.

(a) Each SEA shall ensure that each public agency establishes and implements a goal of providing full educational opportunity to all children with disabilities in the area served by the public agency.

(b) Subject to the priority requirements of §§ 300.320-300.324 an SEA or LEA may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

(Authority: 20 U.S.C. §§ 1412(2)(A); 1414(a)(1)(C))

Note: In meeting the full educational opportunity goal, the Congress also encouraged LEAs to include artistic and cultural activities in programs supported under this part, subject to the priority requirements of §§ 300.320-300.324. This point is addressed in the following statements from the Senate Report on Public Law 94-142:

The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that local educational agencies include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.

Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind. Therefore, in light of the national policy concerning the use of museums in federally supported education programs enunciated in the Education Amendments of 1974, the Committee also urges local educational agencies to include museums in programs for the handicapped funded under this Act.

(Authority: S. Rep. No. 94-168, p. 13 (1975))

§ 300.305 Program options.

Each public agency shall take steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(Authority: 20 U.S.C. §§ 1412(2)(A); 1414(a)(1)(C))

Note: The above list of program options is not exhaustive, and could include any program or activity in which nondisabled students participate.

§ 300.306 Nonacademic services

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(Authority: 20 U.S.C. §§ 1412(2)(A); 1414(a)(1)(C))

§ 300.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every child with a disability receiving FAPE.

(b) *Regular physical education.* Each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's IEP.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's IEP, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for those services to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a child with a disability who is enrolled in a separate facility shall ensure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(Authority: 20 U.S.C. 1401(a)(16); 1412(5)(B); 1414(a)(6))

Note: The Report of the House of Representatives on Public Law 94-142 includes the following statement regarding physical education:

Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all nonhandicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

* * * * *

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

(Authority: H. R. Rep. No. 94-332, p. 9 (1975))

§ 300.308 Assistive technology.

Each public agency shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§ 300.5-300.6, are made available to a child with a disability if required as a part of the child's

(a) Special education under § 300.17;

(b) Related services under § 300.16; or

(c) Supplementary aids and services under § 300.550(b)(2).

(Authority: 20 U.S.C. § 1412(2), (5)(B))

Priorities in the Use of Part B Funds

§ 300.320 Definitions of first priority children and second priority children.

For the purposes of §§ 300.321-300.324, the term:

(a) "First priority children" means children with disabilities who

(1) Are in an age group for which the State must make FAPE available under § 300.300; and

(2) Are not receiving any education.

(b) "Second priority children" means children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education.

(Authority: 20 U.S.C. § 1412(3))

Note 1: After September 1, 1978, there should be no second priority children, since States must ensure, as a condition of receiving Part B funds for fiscal year 1979, that all children with disabilities will have FAPE available by that date.

Note 2: The term "free appropriate public education," as defined in § 300.8, means special education and related services that * * * "are provided in conformity with an IEP" * * *.

New first priority children will continue to be found by the State after September 1, 1978 through on-going efforts to identify, locate, and evaluate all children with disabilities.

§ 300.321 Priorities.

(a) Each SEA and LEA shall use funds provided under part B of the Act in the following order of priorities:

(1) To provide FAPE to first priority children, including the identification, location, and evaluation of first priority children.

(2) To provide FAPE to second priority children, including the identification, location, and evaluation of second priority children.

(3) To meet the other requirements of this part.

(b) The requirements of paragraph (a) of this section do not apply to funds that the State uses for administration under § 300.620.

(Authority: 20 U.S.C. § 1411(b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii))

Note: SEAs as well as LEAs must use part B funds (except the portion used for State administration) for the priorities. A State may have to set aside a portion of its part B allotment to be able to serve newly identified first priority children.

After September 1, 1978, part B funds may be used

(1) To continue supporting child identification, location, and evaluation activities;

(2) To provide FAPE to newly identified first priority children;

(3) To meet the full educational opportunity goal required under § 300.304, including employing additional personnel and providing inservice training, in order to increase the level, intensity, and quality of services provided to individual children with disabilities; and

(4) To meet the other requirements of part B.

§ 300.322 [Reserved]

§ 300.323 Services to other children.

If a State or an LEA is providing FAPE to all of its first priority children, that State or LEA may use funds provided under part B of the Act—

(a) To provide FAPE to children with disabilities who are not receiving any education and who are in the age groups not covered under § 300.300 in that State; or

(b) To provide FAPE to second priority children; or

(c) Both.

(Authority: 20 U.S.C. § 1411 (b)(1)(B), (b)(2)(B), (c)(2)(A)(ii))

§ 300.324 Application of local educational agency to use funds for the second priority.

An LEA may use funds provided under part B of the Act for second priority children, if it provides assurance satisfactory to the SEA in its application (or an amendment to its application)—

(a) That all first priority children have FAPE available to them;

(b) That the LEA has a system for the identification, location, and evaluation of children with disabilities, as described in its application; and

(c) That whenever a first priority child is identified, located, and evaluated, the LEA makes FAPE available to the child.

(Authority: 20 U.S.C. §§ 1411(b)(1)(B), (c)(1)(B); 1414(a)(1)(C)(ii))

Individualized Education Programs

§ 300.340 Definitions.

(a) As used in this part, the term "individualized education program" means a written statement for a child with a disability that is developed and implemented in accordance with §§ 300.341-300.350.

(b) As used in §§ 300.346 and 300.347, "participating agency" means a State or local agency, other than the public agency responsible for a student's education, that is financially and legally responsible for providing transition services to the student.

(Authority: 20 U.S.C. § 1401(a)(20))

§ 300.341 State educational agency responsibility.

(a) *Public agencies.* The SEA shall ensure that each public agency develops and implements an IEP for each of its children with disabilities.

(b) *Private schools and facilities.* The SEA shall ensure that an IEP is developed and implemented for each child with a disability who—

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial school or other private school and receives special education or related services from a public agency.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1412(4), (6); 1413(a)(4))

Note: This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare) that provide special education to a child with a disability either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a child with a disability, that agency would be responsible for ensuring that an IEP is developed for the child.

§ 300.342 When individualized education programs must be in effect.

(a) At the beginning of each school year, each public agency shall have in effect an IEP for every child with a disability who is receiving special education from that agency.

(b) An IEP must—

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 300.343.

(Authority: 20 U.S.C. §§ 1412(2)(B), (4), (6); 1414(a)(5); Pub. L. 94-142, sec. 8(c) (1975))

Note: Under paragraph (b)(2) of this section, it is expected that the IEP of a child with a disability will be implemented immediately following the meetings under § 300.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances that require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

§ 300.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with State policy and at the discretion of the LEA, and with the concurrence of the parents, an individualized family service plan described in section 677(d) of the Act for each child with a disability, aged 3 through 5).

(b) [Reserved]

(c) *Timeline.* A meeting to develop an IEP for a child must be held within 30 calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

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(Authority: 20 U.S.C. §§ 1412(2)(B), (4), (6); 1414(a)(5))

Note: The date on which agencies must have IEPs in effect is specified in § 300.342 (the beginning of each school year). However, except for new children with disabilities (i.e., those evaluated and determined to need special education and related services for the first time), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect at the beginning of the school year, agencies could hold meetings either at the end of the preceding school year or during the summer prior to the next school year. Meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review and, if appropriate, revise each child's IEP. The timing of those meetings could be on the anniversary date of the child's last IEP meeting, but this is left to the discretion of the agency.

§ 300.344 Participants in meetings.

(a) *General.* The public agency shall ensure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 300.345.

(4) The child, if appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a child with a disability who has been evaluated for the first time, the public agency shall ensure—

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(c) *Transition services participants.*

(1) If a purpose of the meeting is the consideration of transition services for a student, the public agency shall invite—

(i) The student; and

(ii) A representative of any other public agency that is likely to be responsible for providing or paying for transition services.

(2) If the student does not attend, the public agency shall take other steps to ensure that the student's preferences and interests are considered; and

(3) If an agency invited to send a representative to a meeting does not do so, the public agency shall take other steps to obtain the participation of the other agency in the planning of any transition services.

(Authority: 20 U.S.C. §§ 1401(a)(19), (a)(20); 1412(2)(B), (4), (6); 1414(a)(5))

Note 1: In deciding which teacher will participate in meetings on a child's IEP, the agency may wish to consider the following possibilities:

(a) For a child with a disability who is receiving special education, the teacher could be the child's special education teacher. If the child's disability is a speech impairment, the teacher could be the speech-language pathologist.

(b) For a child with a disability who is being considered for placement in special education, the teacher could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

For a child whose primary disability is a speech or language impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

Note 2: Under paragraph (c) of this section, the public agency is required to invite each student to participate in his or her IEP meeting, if a purpose of the meeting is the consideration of transition services for the student. For all students who are 16 years of age or older, one of the purposes of the annual meeting will always be the planning of transition services, since transition services are a required component of the IEP for these students.

For a student younger than age 16, if transition services are initially discussed at a meeting that does not include the student, the public agency is responsible for ensuring that, before a decision about transition services for a student is made, a subsequent IEP meeting is conducted for that purpose, and the student is invited to the meeting.

§ 300.345 Parent participation.

(a) Each public agency shall take steps to ensure that one or both of the parents of the child with a disability are present at each meeting or are afforded the opportunity to participate, including—

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b)(1) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting and who will be in attendance;

(2) If a purpose of the meeting is the consideration of transition services for a student, the notice must also—

(i) Indicate this purpose;

(ii) Indicate that the agency will invite the student; and

(iii) Identify any other agency that will be invited to send a representative.

(c) If neither parent can attend, the public agency shall use other methods to ensure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as—

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the IEP.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1401(a)(20); 1412(2)(B), (4), (6); 1414(a)(5))

Note: The notice in paragraph (a) of this section could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c) of this section, the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

§ 300.346 Content of individualized education program.

(a) *General.* The IEP for each child must include—

(1) A statement of the child's present levels of educational performance;

(2) A statement of annual goals, including short-term instructional objectives;

(3) A statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs;

(4) The projected dates for initiation of services and the anticipated duration of the services; and

(5) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(b) *Transition services.*

(1) The IEP for each student, beginning no later than age 16 (and at a younger age, if determined appropriate), must include a statement of the needed transition services as defined in § 300.18, including, if appropriate, a statement of each public agency's and each participating agency's responsibilities or linkages, or both, before the student leaves the school setting.

(2) If the IEP team determines that services are not needed in one or more of the areas specified in § 300.18 (b)(2)(i) through (b)(2)(iii), the IEP must include a statement to that effect and the basis upon which the determination was made.

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(Authority: 20 U.S.C. §§ 1401 (a)(19), (a)(20); 1412 (2)(B), (4), (6); 1414(a)(5))

Note 1: The legislative history of the transition services provisions of the Act suggests that the statement of needed transition services referred to in paragraph (b) of this section should include a commitment by any participating agency to meet any financial responsibility it may have in the provision of transition services. See House Report No. 101-544, p. 11 (1990).

Note 2: With respect to the provisions of paragraph (b) of this section, it is generally expected that the statement of needed transition services will include the areas listed in § 300.18 (b)(2)(i) through (b)(2)(iii). If the IEP team determines that services are not needed in one of those areas, the public agency must implement the requirements in paragraph (b)(2) of this section. Since it is a part of the IEP, the IEP team must reconsider its determination at least annually.

Note 3: Section 602(a)(20) of the Act provides that IEPs must include a statement of needed transition services for students beginning no later than age 16, but permits transition services to students below age 16 (i.e., " * * * and, when determined appropriate for the individual, beginning at 14 or younger.") Although the statute does not mandate transition services for all students beginning at age 14 or younger, the provision of these services could have a significantly positive effect on the employment and independent living outcomes for many of these students in the future, especially for students who are likely to drop out before age 16. With respect to the provision of transition services to students below age 16, the Report of the House Committee on Education and Labor on Public Law 101-476 includes the following statement:

> Although this language leaves the final determination of when to initiate transition services for students under age 16 to the IEP process, it nevertheless makes clear that Congress expects consideration to be given to the need for transition services for some students by age 14 or younger. The Committee encourages that approach because of their concern that age 16 may be too late for many students, particularly those at risk of dropping out of school and those with the most severe disabilities. Even for those students who stay in school until age 18, many will need more than two years of transitional services. Students with disabilities are now dropping out of school before age 16, feeling that the education system has little to offer them. Initiating services at a younger age will be critical. (House Report No. 101-544, 10 (1990).)

§ 300.347 Agency responsibilities for transition services.

(a) If a participating agency fails to provide agreed-upon transition services contained in the IEP of a student with a disability, the public agency responsible for the student's education shall, as soon as possible, initiate a meeting for the purpose of identifying alternative strategies to meet the transition objectives and, if necessary, revising the student's IEP.

(b) Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.

(Authority: 20 U.S.C. §§ 1401 (a)(18), (a)(19), (a)(20); 1412(2)(B))

§ 300.348 Private school placements by public agencies.

(a) *Developing individualized education programs*

(1) Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an IEP for the child in accordance with § 300.343.

(2) The agency shall ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency shall use other methods to ensure participa-

tion by the private school or facility, including individual or conference telephone calls.

(3) [Reserved]

(b) *Reviewing and revising individualized education programs.*

(1) After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall ensure that the parents and an agency representative:

(i) Are involved in any decision about the child's IEP; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

(Authority: 20 U.S.C. § 1413(a)(4)(B))

§ 300.349 Children with disabilities in parochial or other private schools.

If a child with a disability is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall—

(a) Initiate and conduct meetings to develop, review, and revise an IEP for the child, in accordance with § 300.343; and

(b) Ensure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school, including individual or conference telephone calls.

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(Authority: 20 U.S.C. § 1413(a)(4)(A))

§ 300.350 Individualized education program—accountability.

Each public agency must provide special education and related services to a child with a disability in accordance with an IEP. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(Authority: 20 U.S.C. §§ 1412(2)(B); 1414(a)(5), (6); Cong. Rec. at H7152 (daily ed., July 21, 1975))

Note: This section is intended to relieve concerns that the IEP constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the goals and objectives listed in the IEP. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

Direct Service by the State Educational Agency

§ 300.360 Use of local educational agency allocation for direct services.

(a) An SEA may not distribute funds to an LEA, and shall use those funds to ensure the provision of FAPE to children with disabilities residing in the area served by the LEA, if the LEA, in any fiscal year—

(1) Is entitled to less than $7,500 for that fiscal year (beginning with fiscal year 1979);

(2) Does not submit an application that meets the requirements of §§ 300.220-300.240;

(3) Is unable or unwilling to establish and maintain programs of FAPE;

(4) Is unable or unwilling to be consolidated with other LEAs in order to establish and maintain those programs; or

(5) Has one or more children with disabilities who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements in paragraph (a) of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements of §§ 300.182-300.186 do not apply to the SEA.

(Authority: 20 U.S.C. §§ 1411(c)(4); 1413(b); 1414(d))

Note: Section 300.360 is a combination of three provisions in the statute (Sections 611(c)(4); 613(b); and 614(d)). This section focuses mainly on the State's administration and use of local entitlements under Part B.

The SEA, as a recipient of Part B funds, is responsible for ensuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If an LEA elects not to apply for its Part B entitlement, the State would be required to use those funds to ensure that FAPE is made available to children residing in the area served by that local agency. However, if the local entitlement is not sufficient for this purpose, additional State or local funds would have to be expended in order to ensure that FAPE and the other requirements of the Act are met.

Moreover, if the LEA is the recipient of any other Federal funds, if would have to be in compliance with 34 CFR §§ 104.31-104.39 of the regulations implementing Section 504 of the Rehabilitation Act of 1973. It should be noted that the term "FAPE" has different meanings under Part B and Section 504. For example, under Part B, FAPE is a statutory term that requires special education and related services to be provided in accordance with an IEP. However, under Section 504, each recipient must provide an education that includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * *" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the FAPE requirement.

§ 300.361 Nature and location of services.

The SEA may provide special education and related services under § 300.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the LRE provisions of §§ 300.550-300.556).

(Authority: 20 U.S.C. § 1414(d))

§ 300.370 Use of State agency allocations.

(a) The State may use the portion of its allocation that it does not use for administration under § 300.620-300.621

(1) For support services and direct services in accordance with the priority requirements of §§ 300.320-300.324; and

(2) For the administrative costs of the State's monitoring activities and complaint investigations, to the extent that these costs exceed the administrative costs for monitoring and complaint investigations incurred during fiscal year 1985.

(b) For the purposes of paragraph (a) of this section

(1) "Direct services" means services provided to a child with a disability by the State directly, by contract, or through other arrangements; and

(2) "Support services" includes implementing the comprehensive system of personnel development of §§ 300.380-300.383, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to FAPE for children with disabilities.

(Authority: 20 U.S.C. § 1411 (b)(2), (c)(2))

§ 300.371 State matching.

Beginning with the period July 1, 1978 - June 30, 1979, and for each following fiscal year, the funds that a State uses for direct and support services under § 300.370 must be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that a State uses under § 300.360.

(Authority: 20 U.S.C. § 1411(c)(2)(B), (c)(4)(B))

Note: The requirement in § 300.371 would be satisfied if the State can document that the amount of State funds expended for each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

§ 300.372 Applicability of nonsupplanting requirement.

Beginning with funds appropriated for fiscal year 1979 and for each following fiscal year, the requirement in section 613(a)(9) of the Act, which prohibits supplanting with Federal funds, does not apply to funds that the State uses from its allocation under § 300.706(a) for administration, direct services, or support services.

(Authority: 20 U.S.C. § 1411(c)(3))

Comprehensive System of Personnel Development

§ 300.380 General.

Each State shall

(a) Develop and implement a comprehensive system of personnel development that

(1) Is consistent with the purposes of the Act and with the comprehensive system of personnel development described in 34 CFR § 303.360;

(2) Meets the requirements in §§ 300.381-300.383; and

(3) Is consistent with the provisions on personnel standards in § 300.153; and

(b) Include in its State plan a description of the personnel development system required in paragraph (a)(1) of this section.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413 (a)(3), (a)(14))

§ 300.381 Adequate supply of qualified personnel.

Each State plan must include a description of the procedures and activities the State will undertake to ensure an adequate supply of qualified personnel (as the term "qualified" is defined at § 300.15), including special education and related services personnel and leadership personnel, necessary to carry out the purposes of this part. The procedures and activities must include the development, updating, and implementation of a plan that—

(a) Addresses current and projected special education and related services personnel needs, including the need for leadership personnel; and

(b) Coordinates and facilitates efforts among SEA and LEAs, institutions of higher education, and professional associations to recruit, prepare, and retain qualified personnel, including personnel from minority backgrounds, and personnel with disabilities.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(3)(A))

§ 300.382 Personnel preparation and continuing education.

Each State plan must include a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this part are appropriately and adequately prepared. The procedures and activities must include—

(a) A system for the continuing education of regular and special education and related services personnel to enable these personnel to meet the needs of children with disabilities under this part;

(b) Procedures for acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research and other sources; and

(c) Procedures for adopting, if appropriate, promising practices, materials, and technology, proven effective through research and demonstration.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(3)(B))

§ 300.383 Data system on personnel and personnel development.

(a) *General.* The procedures and activities required in §§ 300.381 and 300.382 must include the development and maintenance of a system for determining, on an annual basis, the data required in paragraphs (b) and (c) of this section.

(b) *Data on qualified personnel.* (1) The system required by paragraph (a) of this section must enable each State to determine, on an annual basis—

(i) The number and type of personnel, including leadership personnel, employed in the provision of special education and related services, by profession or discipline;

(ii) The number and type of personnel who are employed with emergency, provisional, or temporary certification in each profession or discipline who do not hold appropriate State certification, licensure, or other credentials comparable to certification or licensure for that profession or discipline; and

(iii) The number and type of personnel, including leadership personnel, in each profession or discipline needed, and a projection of the numbers of those personnel that will be needed in five years, based on projections of individuals to be served, retirement and other departures of personnel from the field, and other relevant factors.

(2) The data on special education and related services personnel required in paragraph (b)(1) of this section must include audiologists, counselors, diagnostic and evaluation personnel, home-hospital teachers, interpreters for students with hearing impairments including deafness, occupational therapists, physical education teachers, physical therapists, psychologists, rehabilitation counselors, social workers, speech-language pathologists, teacher aides, recreation and therapeutic recreation specialists, vocational education teachers, work-study coordinators, and other instructional and noninstructional staff.

(3) The data on leadership personnel required by paragraph (b)(1) of this section must include administrators and supervisors of State or local agencies who are involved in the provision or supervision of services or activities necessary to carry out the purposes of this part.

(c) *Data on personnel development.* The system required in paragraph (a) of this section must enable each State to determine, on an annual basis, the institutions of higher education within the State that are preparing special education and related services personnel, including leadership personnel, by area of specialization, including—

(1) The numbers of students enrolled in programs for the preparation of special education and related services personnel administered by these institutions of higher education; and

(2) The numbers of students who graduated during the past year with certification or licensure, or with credentials to qualify for certification or licensure, from programs for the preparation of

special education and related services personnel administered by institutions of higher education.

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(Authority: 20 U.S.C. § 1413(a)(3)(A))

§§ 300.384-300.387 [Reserved]

Subpart D—Private Schools

Children With Disabilities in Private Schools Placed or Referred by Public Agencies

§ 300.400 Applicability of §§ 300.400-300.402.

Sections of 300.401-300.402 apply only to children with disabilities who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(Authority: 20 U.S.C. § 1413(a)(4)(B))

§ 300.401 Responsibility of State educational agency.

Each SEA shall ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services—

(1) In conformance with an IEP that meets the requirements of §§ 300.340-300.350;

(2) At no cost to the parents; and

(3) At a school or facility that meets the standards that apply to the SEA and LEAs (including the requirements of this part); and

(b) Has all of the rights of a child with a disability who is served by a public agency.

(Authority: 20 U.S.C. § 1413(a)(4)(B))

§ 300.402 Implementation by State educational agency.

In implementing § 300.401, the SEA shall—

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a child with a disability; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards that apply to them.

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(Authority: 20 U.S.C. § 1413(a)(4)(B))

§ 300.403 Placement of children by parents.

(a) If a child with a disability has FAPE available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 300.450-300.452.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures of §§ 300.500-300.515.

(Authority: 20 U.S.C. § 1412(2)(B); 1415)

Children With Disabilities Enrolled by Their Parents in Private Schools

§ 300.450 Definition of "private school children with disabilities."

As used in this part, "private school children with disabilities" means children with disabilities enrolled by their parents in private schools or facilities other than children with disabilities covered under §§ 300.400-300.402.

(Authority: 20 U.S.C. § 1413(a)(4)(A))

§ 300.451 State educational agency responsibility.

The SEA shall ensure that—

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The requirements of 34 CFR §§ 76.651-76.662 are met.

(Authority: 20 U.S.C. § 1413(a)(4)(A))

§ 300.452 Local educational agency responsibility.

Each LEA shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency.

(Authority: 20 U.S.C. §§ 1413(a)(4)(A); 1414(a)(6))

Procedures for By-Pass

§ 300.480 By-Pass—general.

(a) The Secretary implements a by-pass if an SEA is, and was on December 2, 1983, prohibited by law from providing for the participation of private school children with disabilities in the program assisted or carried out under this part, as required by section 613(a)(4)(A) of the Act and by §§ 300.451-300.452.

(b) The Secretary waives the requirement of section 613(a)(4)(A) of the Act and of §§ 300.451-300.452 if the Secretary implements a by-pass.

(Authority: 20 U.S.C. § 1413(d)(1))

§ 300.481 Provisions for services under a by-pass.

(A) Before implementing a by-pass, the Secretary consults with appropriate public and private school officials, including SEA officials, in the affected State to consider matters such as

(1) The prohibition imposed by State law that results in the need for a by-pass;

(2) The scope and nature of the services required by private school children with disabilities in the State and the number of children to be served under the by-pass; and

(3) The establishment of policies and procedures to ensure that private school children with disabilities receive services consistent with the requirements of section 613(a)(4)(A) of the Act, §§ 300.451-300.452, and 34 CFR §§ 76.651-76.662.

(b) After determining that a by-pass is required, the Secretary arranges for the provision of services to private school children with disabilities in the State in a manner consistent with the requirements of section 613(a)(4)(A) of the Act and §§ 300.451-300.452 by providing services through one or more agreements with appropriate parties.

(c) For any fiscal year that a by-pass is implemented, the Secretary determines the maximum amount to be paid to the providers of services by multiplying

(1) A per child amount that may not exceed the amount per child provided by the Secretary under this part for all children with disabilities in the State for the preceding fiscal year; by

(2) The number of private school children with disabilities (as defined by §§ 300.7(a) and 300.450) in the State, as determined by the Secretary on the basis of the most recent satisfactory data available, which may include an estimate of the number of those children with disabilities.

(d) The Secretary deducts from the State's allocation under this part the amount the Secretary determines is necessary to implement a by-pass and pays that amount to the provider of services. The Secretary may withhold this amount from the State's allocation pending final resolution of any investigation or complaint that could result in a determination that a by-pass must be implemented.

(Authority: 20 U.S.C. § 1413(d)(2))

Due Process Procedures

Source: Sections 300.482 through 300.486 appear at 49 FR 48526, Dec. 12, 1984, unless otherwise noted.

§ 300.482 Notice of intent to implement a by-pass.

(a) Before taking any final action to implement a by-pass, the Secretary provides the affected SEA with written notice.

(b) In the written notice, the Secretary

(1) States the reasons for the proposed by-pass in sufficient detail to allow the SEA to respond; and

(2) Advises the SEA that it has a specific period of time (at least 45 days) from receipt of the written notice to submit written objections to the proposed by-pass and that it may request in writing the opportunity for a hearing to show cause why a by-pass should not be implemented.

(c) The Secretary sends the notice to the SEA by certified mail with return receipt requested.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(d)(3)(A))

§ 300.483 Request to show cause.

An SEA seeking an opportunity to show cause why a by-pass should not be implemented shall submit a written request for a show cause hearing to the Secretary.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(d)(3)(A))

§ 300.484 Show cause hearing.

(a) If a show cause hearing is requested, the Secretary

(1) Notifies the SEA and other appropriate public and private school officials of the time and place for the hearing; and

(2) Designates a person to conduct the show cause hearing. The designee must not have had any responsibility for the matter brought for a hearing.

(b) At the show cause hearing, the designee considers matters such as

(1) The necessity for implementing a by-pass;

(2) Possible factual errors in the written notice of intent to implement a by-pass; and

(3) The objections raised by public and private school representatives.

(c) The designee may regulate the course of the proceedings and the conduct of parties during the pendency of the proceedings. The designee takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order.

(d) The designee may interpret applicable statutes and regulations, but may not waive them or rule on their validity.

(e) The designee arranges for the preparation, retention, and, if appropriate, dissemination of the record of the hearing.

(Authority: 20 U.S.C. § 1413(d)(3)(A))

§ 300.485 Decision.

(a) The designee who conducts the show cause hearing

(1) Issues a written decision that includes a statement of findings; and

(2) Submits a copy of the decision to the Secretary and sends a copy to each party by certified mail with return receipt requested.

(b) Each party may submit comments and recommendations on the designee's decision to the Secretary within 15 days of the date the party receives the designee's decision.

(c) The Secretary adopts, reverses, or modifies the designee's decision and notifies the SEA of the Secretary's final action. That notice is sent by certified mail with return receipt requested.

(Authority: 20 U.S.C. § 1413(d)(3)(A))

§ 300.486 Filing requirements.

(a) Any written submission under §§ 300.482-300.485 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary or the hearing officer, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(Authority: 20 U.S.C. § 1413(d)(3)(A))

§ 300.487 Judicial review.

If dissatisfied with the Secretary's final action, the SEA may, within 60 days after notice of that action, file a petition for review with the United States court of appeals for the circuit in which the State is located. The procedures for judicial review are described in section 613(d)(3)(B)-(D) of the Act.

(Authority: 20 U.S.C. § 1413(d)(3)(B)-(D))

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

§ 300.500 Definitions of "consent," "evaluation," and "personally identifiable."

(a) As used in this part: "Consent" means that

(1) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(2) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(3) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

(b) "Evaluation" means procedures used in accordance with §§ 300.530-300.534 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

(c) "Personally identifiable" means that information includes

(1) The name of the child, the child's parent, or other family member;

(2) The address of the child;

(3) A personal identifier, such as the child's social security number or student number; or

(4) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(Authority: 20 U.S.C. §§ 1415, 1417(c))

§ 300.501 General responsibility of public agencies.

Each SEA shall ensure that each public agency establishes and implements procedural safeguards that meet the requirements of §§ 300.500-300.515.

(Authority: 20 U.S.C. § 1415(a))

§ 300.502 Opportunity to examine records.

The parents of a child with a disability shall be afforded, in accordance with the procedures of §§ 300.562-300.569, an opportunity to inspect and review all education records with respect to

(a) The identification, evaluation, and educational placement of the child; and

(b) The provision of FAPE to the child.

(Authority: 20 U.S.C. § 1415(b)(1)(A))

§ 300.503 Independent educational evaluation.

(a) *General.* (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.301.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under § 300.506 to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent education evaluation at private expense, the results of the evaluation

(1) Must be considered by the public agency in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(Authority: 20 U.S.C. § 1415(b)(1)(A))

§ 300.504 Prior notice; parent consent.

(a) *Notice.* Written notice that meets the requirements of § 300.505 must be given to the parents of a child with a disability a reasonable time before the public agency

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) *Consent; procedures if a parent refuses consent.* (1) Parental consent must be obtained before

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a child with a disability in a program providing special education and related services.

(2) If State law requires parental consent before a child with a disability is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(3) If there is no State law requiring consent before a child with a disability is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 300.506-300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent. If it does so and the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 300.510-300.513.

(c) *Additional State consent requirements.* In addition to the parental consent requirements described in paragraph (b) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(d) *Limitation.* A public agency may not require parental consent as a condition of any benefit to the parent or the child except for the service or activity for which consent is required under paragraphs (b) or (c) of this section.

(Authority: 20 U.S.C. §§ 1415(b)(1)(C), (D); 1412(2), (6))

Note 1: Any changes in a child's special education program after the initial placement are not subject to the parental consent requirements in paragraph (b)(1) of this section, but are subject to the prior notice requirement in paragraph (a) of this section and the IEP requirements of §§ 300.340-300.350.

Note 2: Paragraph (b)(2) of this section means that if State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures of §§ 300.506-300.508 to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

Note 3: If a State adopts a consent requirement in addition to those described in paragraph (b) of this section and consent is refused, paragraph (d) of this section requires that the public agency must nevertheless provide the services and activities that are not in dispute. For example, if a State requires parental consent to the provision of all services identified in an IEP and the parent refuses to consent to physical therapy services included in the IEP, the agency is not relieved of its obligation to implement those portions of the IEP to which the parent consents.

If a parent refuses to consent and the public agency determines that the service or activity in dispute is necessary to provide FAPE to the child, paragraph (c) of this section requires that the agency must implement its procedures to override the refusal. This section does not preclude the agency from reconsidering its proposal if it believes that circumstances warrant.

§ 300.505 Content of notice.

(a) The notice under § 300.504 must include—

(1) A full explanation of all of the procedural safeguards available to the parents under § 300.500, §§ 300.502-300.515, and §§ 300.562-300.569.

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors that are relevant to the agency's proposal or refusal.

(b) The notice must be—

(1) Written in language understandable to the general public; and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the SEA or LEA shall take steps to ensure—

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice; and

(3) That there is written evidence that the requirements in paragraphs (c)(1) and (2) of this section have been met.

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(Authority: 20 U.S.C. § 1415(b)(1)(D))

§ 300.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in § 300.504 (a)(1) and (2).

(b) The hearing must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if—

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(Authority: 20 U.S.C. § 1415(b)(2))

Note: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of children with disabilities, and the provision of FAPE to those children. Mediations have been conducted by members of SEAs or LEA personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under §§ 300.500-300.515.

§ 300.507 Impartial hearing officer.

(a) A hearing may not be conducted—

(1) By a person who is an employee of a public agency that is involved in the education or care of the child; or

(2) By any person having a personal or professional interest that would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(Authority: 20 U.S.C. § 1414(b)(2))

§ 300.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses.

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing.

(4) Obtain a written or electronic verbatim record of the hearing.

(5) Obtain written findings of fact and decisions. The public agency, after deleting any personally identifiable information, shall—

(i) Transmit those findings and decisions to the State advisory panel established under § 300.650; and

(ii) Make those findings and decisions available to the public.

(b) Parents involved in hearings must be given the right to—

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(Authority: 20 U.S.C. § 1415(d))

§ 300.509 Hearing decision; appeal.

A decision made in a hearing conducted under § 300.506 is final, unless a party to the hearing appeals the decision under § 300.510 or § 300.511.

(Authority: 20 U.S.C. § 1415(c))

§ 300.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA.

(b) If there is an appeal, the SEA shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record.

(2) Ensure that the procedures at the hearing were consistent with the requirements of due process.

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 300.508 apply.

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official.

(5) Make an independent decision on completion of the review.

(6) Give a copy of written findings and the decision to the parties.

(c) The SEA, after deleting any personally identifiable information, shall—

(1) Transmit the findings and decisions referred to in paragraph (b)(6) of this section to the State advisory panel established under § 300.650; and

(2) Make those findings and decisions available to the public.

(d) The decision made by the reviewing official is final unless a party brings a civil action under §300.511.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1415(c), (d); H.R. Rep. No. 94-664, at p. 49 (1975))

Note 1: The SEA may conduct its review either directly or through another State agency acting on its behalf. However, the SEA remains responsible for the final decision on review.

Note 2: All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in § 300.508 relating to hearings also apply.

§ 300.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under § 300.510, and any party aggrieved by the decision of a reviewing officer under § 300.510 has the right to bring a civil action under section 615(e)(2) of the Act.

(Authority: 20 U.S.C. § 1415)

§ 300.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall ensure that not later than 45 days after the receipt of a request for a hearing

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The SEA shall ensure that not later than 30 days after the receipt of a request for a review

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1415)

§ 300.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(Authority: 20 U.S.C. § 1415(e)(3))

Note: Section 300.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§ 300.514 Surrogate parents.

(a) *General.* Each public agency shall ensure that the rights of a child are protected when

(1) No parent (as defined in § 300.13) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method: (1) For determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.*

1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall ensure that a person selected as a surrogate

(i) Has no interest that conflicts with the interest of the child he or she represents; and

(ii) Has knowledge and skills that ensure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency that is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraphs (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(Authority: 20 U.S.C. § 1415(b)(1)(B))

§ 300.515 Attorneys' fees.

Each public agency shall inform parents that in any action or proceeding under section 615 of the Act, courts may award parents reasonable attorneys' fees under the circumstances described in section 615(e)(4) of the Act.

(Authority: 20 U.S.C. §§ 1415(b)(1)(D); 1415(e)(4))

Protection in Evaluation Procedures

§ 300.530 General.

(a) Each SEA shall ensure that each public agency establishes and implements procedures that meet the requirements of §§ 300.530-300.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of children with disabilities must be selected and administered so as not to be racially or culturally discriminatory.

(Authority: 20 U.S.C. § 1412(5)(C))

§ 300.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a child with a disability in a program providing special education and related services, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of § 300.532.

(Authority: 20 U.S.C. § 1412(5)(C))

§ 300.532 Evaluation procedures.

State educational agencies and LEAs shall ensure, at a minimum, that:

(a) Tests and other evaluation materials

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer.

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child.

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

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(Authority: 20 U.S.C. § 1412(5)(C))

Note: Children who have a speech or language impairment as their primary disability may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would: (1) Evaluate each child with a speech or language impairment using procedures that are appropriate for the diagnosis and appraisal of speech and language impairments, and (2) if necessary, make referrals for additional assessments needed to make an appropriate placement decision.

§ 300.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.

(2) Ensure that information obtained from all of these sources is documented and carefully considered:

(3) Ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Ensure that the placement decision is made in conformity with the LRE rules in §§ 300.550-300.554.

(b) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with §§ 300.340-300.350.

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(Authority: 20 U.S.C. §§ 1412(5)(C); 1414(a)(5))

Note: Paragraph (a)(1) of this section includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to ensure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other children with disabilities, such as a child who has a severe articulation impairment as his primary disability. For such a child, the speech-language pathologist, in complying with the multiple source requirement, might use: (1) A standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

§ 300.534 Reevaluation.

Each SEA and LEA shall ensure—

(a) That the IEP of each child with a disability is reviewed in accordance with §§ 300.340-300.350; and

(b) That an evaluation of the child, based on procedures that meet the requirements of § 300.532, is conducted every three years, or more frequently if conditions warrant, or if the child's parent or teacher requests an evaluation.

(Authority: 20 U.S.C. § 1412(5)(C))

Additional Procedures for Evaluating Children With Specific Learning Disabilities

§ 300.540 Additional team members.

In evaluating a child suspected of having a specific learning disability, in addition to the requirements of § 300.532, each public agency shall include on the multidisciplinary evaluation team—

(a)(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(Authority: 20 U.S.C. § 1411 note)

§ 300.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if—

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas—

(i) Oral expression;
(ii) Listening comprehension;
(iii) Written expression;
(iv) Basic reading skill;
(v) Reading comprehension;
(vi) Mathematics calculation; or
(vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of—

(1) A visual, hearing, or motor impairment;
(2) Mental retardation;
(3) Emotional disturbance; or
(4) Environmental, cultural or economic disadvantage.

(Authority: 20 U.S.C. § 1411 note)

§ 300.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(Authority: 20 U.S.C. § 1411 note)

§ 300.543 Written report.

(a) The team shall prepare a written report of the results of the evaluation.

(b) The report must include a statement of—

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

(5) The educationally relevant medical findings, if any;

(6) Whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(c) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

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(Authority: 20 U.S.C. § 1411 note)

Least Restrictive Environment

§ 300.550 General.

(a) Each SEA shall ensure that each public agency establishes and implements procedures that meet the requirements of §§ 300.550-300.556.

(b) Each public agency shall ensure—

(1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(Authority: 20 U.S.C. §§ 1412(5)(B); 1414(a)(1)(C)(iv))

§ 300.551 Continuum of alternative placements.

(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under § 300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(Authority: 20 U.S.C. § 1412(5)(B))

§ 300.552 Placements.

Each public agency shall ensure that—

(a) The educational placement of each child with a disability—

(1) Is determined at least annually;

(2) Is based on his or her IEP; and

(3) Is as close as possible to the child's home.

(b) The various alternative placements included at § 300.551 are available to the extent necessary to implement the IEP for each child with a disability.

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.

(Authority: 20 U.S.C. § 1412(5)(B))

Note: Section 300.552 includes some of the main factors that must be considered in determining the extent to which a child with a disability can be educated with children who are nondisabled. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to ensure that each child with a disability receives an education that is appropriate to his or her individual needs.

The requirements of § 300.552, as well as the other requirements of §§ 300.550-300.556, apply to all preschool children with disabilities who are entitled to receive FAPE. Public agencies that provide preschool programs for nondisabled preschool children must ensure that the requirements of §300.552(c) are met. Public agencies that do not operate programs for nondisabled preschool children are not required to initiate such programs solely to satisfy the requirements regarding placement in the LRE embodied in §§ 300.550-300.556. For these public agencies, some alternative methods for meeting the requirements of §§ 300.550-300.556 include—

(1) Providing opportunities for the participation (even part-time) of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start);

(2) Placing children with disabilities in private school programs for nondisabled preschool children or private school preschool programs that integrate children with disabilities and nondisabled children; and

(3) Locating classes for preschool children with disabilities in regular elementary schools.

In each case the public agency must ensure that each child's placement is in the LRE in which the unique needs of that child can be met based upon the child's IEP, and meets all of the other requirements of §§ 300.340-300.350 and §§ 300.550-300.556.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 CFR part 104—Appendix, Paragraph 24) includes several points regarding educational placements of children with disabilities that are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *."

2. With respect to placing a child with a disability in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

§ 300.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.306, each public agency shall ensure that each child with a disability participates with nondisabled children in those services and activities to the maximum extent appropriate to the needs of that child.

(Authority: 20 U.S.C. § 1412(5)(B))

Note: Section 300.553 is taken from a requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[This paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children." (34 CFR part 104—Appendix, Paragraph 24.)

§ 300.554 Children in public or private institutions

Each SEA shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to ensure that § 300.550 is effectively implemented.

(Authority: 20 U.S.C. § 1412(5)(B))

Note: Under section 612(5)(B) of the statute, the requirement to educate children with disabilities with nondisabled children also applies to children in public and private institutions or other care facilities. Each SEA must ensure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

§ 300.555 Technical assistance and training activities.

Each SEA shall carry out activities to ensure that teachers and administrators in all public agencies—

(a) Are fully informed about their responsibilities for implementing § 300.550; and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(Authority: 20 U.S.C. § 1412(5)(B)

§ 300.556 Monitoring activities.

(a) The SEA shall carry out activities to ensure that § 300.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with §300.550, the SEA shall—

(1) Review the public agency's justification for its actions; and

(2) Assist in planning and implementing any necessary corrective action.

(Authority: 20 U.S.C. § 1412(5)(B))

Confidentiality of Information

§ 300.560 Definitions.

As used in §§ 300.560-300.576—

Destruction means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

Education records means the type of records covered under the definition of education records in part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

Participating agency means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.561 Notice to parents.

(a) The SEA shall give notice that is adequate to fully inform parents about the requirements of § 300.128, including—

(1) A description of the extent that the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under the Family Educational Rights and Privacy Act of 1974 and implementing regulations in part 99 of this title.

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

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(Authority: 20 U.S.C. §§ 1412 (2)(D); 1417(c))

§ 300.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

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(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

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(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.566 Fees.

(a) Each participating agency may charge a fee for copies of records that are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.567 Amendment of records at parent's request.

(a) A parent who believes that information in the education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request, it shall inform the parent of the refusal, and advise the parent of the right to a hearing under § 300.568.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must—

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

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(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.570 Hearing procedures.

(1) A hearing held under § 300.568 must be conducted according to the procedures under § 99.22 of this title.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is—

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement of this part.

(b) An educational agency or institution subject to part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under part 99 of this title.

(c) The SEA shall include policies and procedures in its State plan that are used in the event that a parent refuses to provide consent under this section.

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(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 300.129 and part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

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(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parent. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

Note: Under § 300.573, the personally identifiable information on a child with a disability may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in paragraph (b) of this section.

§ 300.574 Children's rights.

The SEA shall include policies and procedures in its State plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

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(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

Note: Under the regulations for the Family Education Rights and Privacy Act of 1974 (34 CFR 99.5(a)), the rights of parents regarding education records are transferred to the student at age 18.

§ 300.575 Enforcement.

The SEA shall describe in its State plan the policies and procedures, including sanctions, that the State uses to ensure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

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(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.576 Department.

If the Department or its authorized representatives collect any personally identifiable information regarding children with disabilities that is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Secretary shall apply the requirements of 5 U.S.C. section 552a (b)(1)-(2), (4)-(11); (c); (d); (e)(1); (2); 3(A), (B), and (D), (5)-(10); (h); (m); and (n), and the regulations implementing those provisions in part 5b of this title.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

Department Procedures

§ 300.580 [Reserved]

§ 300.581 Disapproval of a State plan

Before disapproving a State plan, the Secretary gives the SEA written notice and an opportunity for a hearing.

(Authority: 20 U.S.C. § 1413(c))

§ 300.582 Content of notice.

(a) In the written notice the Secretary—

(1) States the basis on which the Secretary proposes to disapprove the State plan;

(2) May describe possible options for resolving the issues;

(3) Advises the SEA that it may request a hearing and that the request for a hearing must be made not later that 30 calendar days after it receives the notice of proposed disapproval; and

(4) Provides information about the procedures followed for a hearing.

(b) The Secretary sends the written notice to the SEA by certified mail with return receipt requested.

(Authority: 20 U.S.C. § 1413(c))

§ 300.583 Hearing official or panel.

(a) If the SEA requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing.

(b) If more than one individual is designated, the Secretary designates one of those individuals as the Chief Hearing Official of the Hearing Panel. If one individual is designated, that individual is the Hearing Official.

(Authority: 20 U.S.C. § 1413(c))

§ 300.584 Hearing procedures.

(a) As used in §§ 300.581-300.586 the term *party or parties* means the following:

(1) An SEA that requests a hearing regarding the proposed disapproval of its State plan under this part.

(2) The Department of Education official who administers the program of financial assistance under this part.

(3) A person, group or agency with an interest in and having relevant information about the case that has applied for and been granted leave to intervene by the Hearing Official or Panel.

(b) Within 15 calendar days after receiving a request for a hearing, the Secretary designates a Hearing Official or Panel and notifies the parties.

(c) The Hearing Official or Panel may regulate the course of proceedings and the conduct of the parties during the proceedings. The Hearing Official or Panel takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including the following:

(1) The Hearing Official or Panel may hold conferences or other types of appropriate proceedings to clarify, simplify, or define the issues or to consider other matters that may aid in the disposition of the case.

(2) The Hearing Official or Panel may schedule a prehearing conference of the Hearing Official or Panel and parties.

(3) Any party may request the Hearing Official or Panel to schedule a prehearing or other conference. The Hearing Official or Panel decides whether a conference is necessary and notifies all parties.

(4) At a prehearing or other conference, the Hearing Official or Panel and the parties may consider subjects such as—

(i) Narrowing and clarifying issues;

(ii) Assisting the parties in reaching agreements and stipulations;

(iii) Clarifying the positions of the parties;

(iv) Determining whether an evidentiary hearing or oral argument should be held; and

(v) Setting dates for—

(A) The exchange of written documents;

(B) The receipt of comments from the parties on the need for oral argument or evidentiary hearing;

(C) Further proceedings before the Hearing Official or Panel (including an evidentiary hearing or oral argument, if either is scheduled);

(D) Requesting the names of witnesses each party wishes to present at an evidentiary hearing and estimation of time for each presentation; or

(E) Completion of the review and the initial decision of the Hearing Official or Panel.

(5) A prehearing or other conference held under paragraph (b)(4) of this section may be conducted by telephone conference call.

(6) At a prehearing or other conference, the parties shall be prepared to discuss the subjects listed in paragraph (b)(4) of this section.

(7) Following a prehearing or other conference the Hearing Official or Panel may issue a written statement describing the issues raised, the action taken, and the stipulations and agreements reached by the parties.

(d) The Hearing Official or Panel may require parties to state their positions and to provide all or part of the evidence in writing.

(e) The Hearing Official or Panel may require parties to present testimony through affidavits and to conduct cross-examination through interrogatories.

(f) The Hearing Official or Panel may direct the parties to exchange relevant documents or information and lists of witnesses, and to send copies to the Hearing Official or Panel.

(g) The Hearing Official or Panel may receive, rule on, exclude, or limit evidence at any stage of the proceedings.

(h) The Hearing Official or Panel may rule on motions and other issues at any stage of the proceedings.

(i) The Hearing Official or Panel may examine witnesses.

(j) The Hearing Official or Panel may set reasonable time limits for submission of written documents.

(k) The Hearing Official or Panel may refuse to consider documents or other submissions if they are not submitted in a timely manner unless good cause is shown.

(l) The Hearing Official or Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(m) (1) The parties shall present their positions through briefs and the submission of other documents and may request an oral argument or evidentiary hearing. The Hearing Official or Panel shall determine whether an oral argument or an evidentiary hearing is needed to clarify the positions of the parties.

(2) The Hearing Official or Panel gives each party an opportunity to be represented by counsel.

(n) If the Hearing Official or Panel determines that an evidentiary hearing would materially assist the resolution of the matter, the Hearing Official or Panel gives each party, in addition to the opportunity to be represented by counsel—

(1) An opportunity to present witnesses on the party's behalf; and

(2) An opportunity to cross-examine witnesses either orally or with written questions.

(o) The Hearing Official or Panel accepts any evidence that it finds is relevant and material to the proceedings and is not unduly repetitious.

(p) (1) The Hearing Official or Panel—

(i) Arranges for the preparation of a transcript of each hearing;

(ii) Retains the original transcript as part of the record of the hearing; and

(iii) Provides one copy of the transcript to each party.

(2) Additional copies of the transcript are available on request and with payment of the reproduction fee.

(q) Each party shall file with the Hearing Official or Panel all written motions, briefs, and other documents and shall at the same time provide a copy to the other parties to the proceedings.

(Authority: 20 U.S.C. § 1413(c))

§ 300.585 Initial decision; final decision.

(a) The Hearing Official or Panel prepares an initial written decision that addresses each of the points in the notice sent by the Secretary to the SEA under § 300.582.

(b) The initial decision of a Panel is made by a majority of Panel members.

(c) The Hearing Official or Panel mails by certified mail with return receipt requested a copy of the initial decision to each party (or to the party's counsel) and to the Secretary, with a notice stating that each party has an opportunity to submit written comments regarding the decision to the Secretary.

(d) Each party may file comments and recommendations on the initial decision with the Hearing Official or Panel within 15 calendar days of the date the party receives the Panel's decision.

(e) The Hearing Official or Panel sends a copy of a party's initial comments and recommendations to the other parties by certified mail with return receipt requested. Each party may file responsive comments and recommendations with the Hearing Official or Panel within seven calendar days of the date the party receives the initial comments and recommendations.

(f) The Hearing Official or Panel forwards the parties' initial and responsive comments on the initial decision to the Secretary who reviews the initial decision and issues a final decision.

(g) The initial decision of the Hearing Official or Panel becomes the final decision of the Secretary unless, within 25 calendar days after the end of the time for receipt of written comments, the Secretary informs the Hearing Official or Panel and the parties to a hearing in writing that the decision is being further reviewed for possible modification.

(h) The Secretary may reject or modify the initial decision of the Hearing Official or Panel if the Secretary finds that it is clearly erroneous.

(i) The Secretary conducts the review based on the initial decision, the written record, the Hearing Official's or Panel's proceedings, and written comments. The Secretary may remand the matter for further proceedings.

(j) The Secretary issues the final decision within 30 calendar days after notifying the Hearing Official or Panel that the initial decision is being further reviewed.

§ 300.586 Filing requirements.

(a) Any written submission under §§ 300.582-300.585 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is—

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary, the Hearing Official, or the Panel, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(Authority: 20 U.S.C. § 1413(c))

§ 300.587 Judicial review.

If a State is dissatisfied with the Secretary's final action with respect to its State plan, the State may, within 60 calendar days after notice of that action, file a petition for review with the United States court of appeals for the circuit in which the State is located.

(Authority: 20 U.S.C. § 1416(b)(1))

§ 300.588 [Reserved]

§ 300.589 Waiver of requirement regarding supplementing and supplanting with Part B funds.

(a) Under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act, SEAs and LEAs must ensure that Federal funds provided under this part are used to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of SEAs or LEAs) expended for special education and related services provided to children with disabilities under this part and in no case to supplant those Federal, State, and local funds. The nonsupplanting requirement applies only to funds allocated to LEAs (See § 300.372).

(b) If the State provides clear and convincing evidence that all children with disabilities have FAPE available to them, the Secretary may waive in part the requirement under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act if the Secretary concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver, it must inform the Secretary in writing. The Secretary then provides the State with a finance and membership report form that provides the basis for the request.

(d) In its request for a waiver, the State shall include the results of a special study made by the State to obtain evidence of the availability of FAPE to all children with disabilities. The special study must include statements by a representative sample of organizations that deal with children with disabilities, and parents and teachers of children with disabilities, relating to the following areas—

(1) The adequacy and comprehensiveness of the State's system for identifying, locating, and evaluating children with disabilities;

(2) The cost to parents, if any, for education for children enrolled in public and private day schools, and in public and private residential schools and institutions; and

(3) The adequacy of the State's due process procedures.

(e) In its request for a waiver, the State shall include finance data relating to the availability of FAPE for all children with disabilities, including—

(1) The total current expenditures for regular education programs and special education programs by function and by source of funds (State, local, and Federal) for the previous school year; and

(2) The full-time equivalent membership of students enrolled in regular programs and in special programs in the previous school year.

(f) The Secretary considers the information that the State provides under paragraphs (d) and (e) of this section, along with any additional information he may request, or obtain through on-site reviews of the State's education programs and records, to determine that all children have FAPE available to them, and if so, the extent of the waiver.

(g) The State may request a hearing with regard to any final action by the Secretary under this section.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1411(c)(3); 1413(a)(9)(B))

Subpart F—State Administration

General

§ 300.600 Responsibility for all educational programs.

(a) The SEA is responsible for ensuring—

(1) That the requirements of this part are carried out; and

(2) That each educational program for children with disabilities administered within the State, including each program administered by any other public agency—

(i) Is under the general supervision of the persons responsible for educational programs for children with disabilities in the SEA; and

(ii) Meets the education standards of the SEA (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(c) This part may not be construed to limit the responsibility of agencies other than educational agencies for providing or paying some or all of the costs of FAPE to children with disabilities in the State.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(6))

Note: The requirement in § 300.600(a) is taken essentially verbatim from section 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of children with disabilities within each State. With respect to SEA responsibility, the Senate Report on Pub. L. 94-142 includes the following statements:

> This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency * * *.
>
> Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (S. Rep. No. 94-168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options that may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning SEA standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's Office issues an administrative directive establishing the SEA responsibility.

(3) State law, regulation, or policy designates the SEA as responsible for establishing standards for all educational programs for individuals with disabilities, and includes responsibility for monitoring.

(4) State law mandates that the SEA is responsible for all educational programs.

§ 300.601 Relation of part B to other Federal programs.

This part may not be construed to permit a State to reduce medical and other assistance available to children with disabilities, or to alter the eligibility of a child with a disability, under title V (Maternal and Child Health) or title XIX (Medicaid) of the Social Security Act, to receive services that are also part of FAPE.

(Authority: 20 U.S.C. § 1413(e))

Use of Funds

§ 300.620 Federal funds for State administration.

A State may use five percent of the total State allotment in any fiscal year under part B of the Act, or $450,000, whichever is greater, for administrative costs related to carrying out sections 612 and 613 of the Act. However, this amount cannot be greater than twenty-five percent of the State's total allotment for the fiscal year under part B of the Act.

(Authority: 20 U.S.C. § 1411(b), (c))

§ 300.621 Allowable costs.

(a) The SEA may use funds under § 300.620 for—

(1) Administration of the State plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of children with disabilities;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of children with disabilities;

(3) Technical assistance to LEAs with respect to the requirements of this part;

(4) Leadership services for the program supervision and management of special education activities for children with disabilities; and

(5) Other State leadership activities and consultative services.

(b) The SEA shall use the remainder of its funds under § 300.620 in accordance with § 300.370.

(Authority: 20 U.S.C. § 1411(b), (c))

State Advisory Panel

§ 300.650 Establishment.

(a) Each State shall establish, in accordance with the provisions of §§ 300.650-300.653, a State advisory panel on the education of children with disabilities.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in § 300.652, the State may modify the existing panel so that it fulfills all of the requirements of §§ 300.650-300.653, instead of establishing a new advisory panel.

(Authority: 20 U.S.C. § 1413 (a)(12))

§ 300.651 Membership.

(a) The membership of the State advisory panel must be composed of persons involved in or concerned with the education of children with disabilities. The membership must include at least one person representative of each of the following groups—

(1) Individuals with disabilities;
(2) Teachers of children with disabilities;
(3) Parents of children with disabilities;
(4) State and local educational officials; and
(5) Special education program administrators.

(b) The State may expand the advisory panel to include additional persons in the groups listed in paragraph (a) of this section and representatives of other groups not listed.

(Authority: 20 U.S.C. § 1413(a)(12))

Note: The membership of the State advisory panel, as listed in paragraphs (a)(1)-(5) of this section, is required in section 613(a)(12) of the Act. As indicated in paragraph (b) of this section, the composition of the panel and the number of members may be expanded at the discretion of the State. In adding to the membership, consideration could be given to having—

(1) An appropriate balance between professional groups and consumers (i.e., parents, advocates, and individuals with disabilities);

(2) Broad representation within the consumer-advocate groups, to ensure that the interests and points of view of various parents, advocates and individuals with disabilities are appropriately represented;

(3) Broad representation within professional groups (e.g., regular education personnel; special educators, including teachers, teacher trainers, and administrators, who can properly represent various dimensions in the education of children with disabilities; and appropriate related services personnel); and

(4) Representatives from other State advisory panels (such as vocational education).

If a State elects to maintain a small advisory panel (e.g., 10-15 members), the panel itself could take steps to ensure that it (1) consults with and receives inputs from various consumer and special interest professional groups, and (2) establishes committees for particular short-term purposes composed of representatives from those input groups.

§ 300.652 Advisory panel functions.

The State advisory panel shall—

(a) Advise the SEA of unmet needs within the State in the education of children with disabilities;

(b) Comment publicly on the State plan and rules or regulations proposed for issuance by the State regarding the education of children with disabilities and the procedures for distribution of funds under this part; and

(c) Assist the State in developing and reporting such information and evaluations as may assist the Secretary in the performance of his responsibilities under section 618 of the Act.

(Authority: 20 U.S.C. § 1413(a)(12))

§ 300.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the SEA. This report must be made available to the public in a manner consistent with other public reporting requirements of this part.

(c) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under § 300.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under § 300.620 for this purpose.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(12))

State Complaint Procedures

§ 300.660 Adoption of State complaint procedures.

Each SEA shall adopt written procedures for:

(a) Resolving any complaint that meets the requirements of § 300.662 by—

(1) Providing for the filing of a complaint with the SEA; and

(2) At the SEA's discretion, providing for the filing of a complaint with a public agency and the right to have the SEA review the public agency's decision on the complaint.

(b) Informing parents and other interested individuals about the procedures in §§ 300.660-300.662.

Approved by the Office of Management and Budget under control number 1820-0599.

(Authority: 20 U.S.C. § 2831(a))

§ 300.661 Minimum State complaint procedures.

Each SEA shall include the following in its complaint procedures:

(a) A time limit of 60 calendar days after a complaint is filed under § 300.660(a) to

(1) Carry out an independent on-site investigation, if the SEA determines that such an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of part B of the Act or of this part; and

(4) Issue a written decision to the complainant that addresses each allegation in the complaint and contains

(i) Findings of fact and conclusions; and

(ii) The reasons for the SEA's final decision.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) Procedures for effective implementation of the SEA's final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance.

(d) The right of the complainant or the public agency to request the Secretary to review the SEA's final decision.

Approved by the Office of Management and Budget under control number 1820-0599.

(Authority: 20 U.S.C. § 2831(a))

§ 300.662 Filing a complaint.

An organization or individual may file a signed written complaint under the procedures described in §§ 300.600-300.661. The complaint must include—

(a) A statement that a public agency has violated a requirement of part B of the Act or of this part; and

(b) The facts on which the statement is based.

Approved by the Office of Management and Budget under control number 1820-0599.

(Authority: 20 U.S.C. § 2831(a))

Subpart G—Allocation of Funds; Reports

Allocations

§ 300.700 Special definition of the term State.

For the purposes of § 300.701, § 300.702, and §§ 300.704-300.708, the term "State" does not include Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau.

(Authority: U.S.C. § 1411(a)(2))

§ 300.701 State entitlement; formula.

(a) The Secretary calculates the maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year as follows:

(1) If the State is eligible for a grant under section 619 of the Act, the maximum entitlement is equal to the number of children with disabilities aged 3 through 21 in the State who are receiving special education and related services, multiplied by 40 percent of the average per pupil expenditure in public elementary and secondary schools in the United States.

(2) If the State is not eligible for a grant under section 619 of the Act, the maximum entitlement is equal to the number of children with disabilities aged 6 through 21 in the State who are receiving special education and related services, multiplied by 40 percent of the average per pupil expenditure in public elementary and secondary schools in the United States.

(Authority: 20 U.S.C. § 1411(a)(1))

(b) [Reserved]

(c) For the purposes of this section, the *average per pupil expenditure in public elementary and secondary schools in the United States*, means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all LEAs in the United States (which, for the purpose of this section, means the 50 States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(Authority: 20 U.S.C. § 1411(a)(4))

§ 300.702 Limitations and exclusions.

(a) In determining the amount of a grant under § 300.701:

(1) If a State serves all children with disabilities aged 3 through 5 in the State, the Secretary does not count children with disabilities aged 3 through 17 in the State to the extent that the number of those children is greater than 12 percent of the number of all children aged 3 through 17 in the State.

(2) If a State does not serve all children with disabilities aged 3 through 5 in the State, the Secretary does not count children with disabilities aged 5 through 17 to the extent that the number of those children is greater than 12 percent of the number of all children aged 5 through 17 in the State.

(3) The Secretary does not count children with disabilities who are counted under subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged 3 through 17 and 5 through 17 in any State is determined by the Secretary on the basis of the most recent satisfactory data available.

(Authority: 20 U.S.C. § 1411(a)(5))

§ 300.703 Ratable reductions.

(a) *General.* If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts that all States are entitled to receive for that fiscal year, the maximum amount that all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(Authority: 20 U.S.C. § 1411(g)(1))

(b) *Reporting dates for Local educational agencies and reallocations.* (1) In any fiscal year that the State entitlement has been ratably reduced, and that additional funds have not been made available to pay in full the total of the amounts under paragraph (a) of this section, the SEA shall fix dates before which each LEA shall report to the State the amount of funds available to it under this part that it estimates it will expend.

(2) The amounts available under paragraph (a) of this section, or any amount that would be available to any other LEA if it were to submit an application meeting the requirements of this part, that the SEA determines will not be used for the period of its availability shall be available for allocation to those LEAs, in the manner provided in § 300.707, that the SEA determines will need and be able to use additional funds to carry out approved programs.

(Authority: 20 U.S.C. § 1411(g)(2))

§ 300.704 Hold harmless provision.

No State shall receive less than the amount it received under part B of the Act for fiscal year 1977.

(Authority: 20 U.S.C. § 1411(a)(1))

§ 300.705 Allocation for State in which by-pass is implemented for private school children with disabilities.

In determining the allocation under §§ 300.700-300.703 of a State in which the Secretary will implement a by-pass for private school children with disabilities under §§ 300.451-300.486, the Secretary includes in the State's child count—

(a) For the first year of a by-pass, the actual or estimated number of private school children with disabilities (as defined in §§ 300.7(a) and 300.450) in the State, as of the preceding December 1; and

(b) For succeeding years of a by-pass, the number of private school children with disabilities who received special education and related services under the by-pass in the preceding year.

(Authority: 20 U.S.C. §§ 1411(a)(1)(A); 1411(a)(3); 1413(d))

§ 300.706 Within-State distribution; fiscal year 1979 and after.

Of the funds received under § 300.701 by any State for fiscal year 1979, and for each fiscal year after fiscal year 1979

(a) 25 percent may be used by the State in accordance with § 300.620 and § 300.370; and

(b) 75 percent shall be distributed to the LEAs in the State in accordance with § 300.707.

(Authority: 20 U.S.C. § 1411(c)(1))

§ 300.707 Local educational agency entitlement; formula.

From the total amount of funds available to all LEAs, each LEA is entitled to an amount that bears the same ratio to the total amount as the number of children with disabilities aged 3 through 21 in that agency who are receiving special education and related services bears to the aggregate number of children with disabilities aged 3 through 21 receiving special education and related services in all LEAs that apply to the SEA for funds under part B of the Act.

(Authority: 20 U.S.C. § 1411(d))

§ 300.708 Reallocation of local educational agency funds.

If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by the local agency with State and local funds otherwise available to the local agency, the SEA may reallocate funds (or portions of those funds that are not required to provide special education and related services) made available to the local agency under § 300.707, to other LEAs within the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by the other LEAs.

(Authority: 20 U.S.C. § 1414(e))

§ 300.709 Payments to the Secretary of the Interior for the education of Indian children.

(a) *General.* (1) The Secretary makes payments to the Secretary of the Interior to meet the need for assistance for the education of children with disabilities on reservations, aged 5 through 21, who are enrolled in elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior.

(2) In the case of Indian students aged 3 through 5 who are enrolled in programs affiliated with Bureau of Indian Affairs (BIA) schools that are required by the States in which the schools are located to attain or maintain State accreditation and had State accreditation prior to October 7, 1991, the schools may count those children for the purpose of distribution of the funds provided under paragraph (a)(1) of this section to the Secretary of the Interior.

(3) The amount of the payment under paragraph (a)(1) of this section for any fiscal year is one percent of the aggregate amounts available to all States under this part for that fiscal year.

(b) *Responsibility for meeting the requirements of part B.* The Secretary of the Interior shall be responsible for meeting all of the requirements of part B of the Act for the children described in paragraph (a) of this section, in accordance with § 300.260.

(Authority: 20 U.S.C. § 1411(f))

§ 300.710 Payments to the Secretary of the Interior for Indian tribes or tribal organizations.

(a) *General.* (1) Beginning with funds appropriated under part B of the Act for fiscal year 1992, the Secretary, subject to this section, makes payments to the Secretary of the Interior to be distributed to tribes or tribal organizations (as defined under section 4 of the Indian Self-Determination and Education Assistance Act) or consortiums of those tribes or tribal organizations to provide for the coordination of assistance for special education and related services for children with disabilities, aged 3 through 5, on reservations served by elementary and secondary schools for Indian children operated or funded by the Department of the Interior.

(2) The amount of the payment under paragraph (b)(1) of this section for any fiscal year is .25 percent of the aggregate amounts available for all States under this part for that fiscal year.

(3) None of the funds allocated under this section may be used by the Secretary of the Interior for administrative purposes, including child count, and the provision of technical assistance.

(b) *Distribution of funds.* The Secretary of the Interior shall distribute the total amount of the .25 percent under paragraph (a) of this section in accordance with section 611(f)(4) of the Act.

(Authority: 20 U.S.C. § 1411(f))

§ 300.711 Entitlements to jurisdictions.

(a) The jurisdictions to which this section applies are Guam, American Samoa, the Virgin

Islands, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau, (until the Compact of Free Association with Palau takes effect pursuant to section 101(a) of Pub. L. 99-658).

(b) Each jurisdiction under paragraph (a) of this section is entitled to a grant for the purposes set forth in section 601(c) of the Act. The amount to which those jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 percent of the aggregate of the amounts available to all States under this part for that fiscal year. Funds appropriated for those jurisdictions shall be allocated proportionately among them on the basis of the number of children aged 3 through 21 in each jurisdiction. However, no jurisdiction shall receive less than $150,000, and other allocations shall be ratably reduced if necessary to ensure that each jurisdiction receives at least that amount.

(c) The amount expended for administration by each jurisdiction under this section shall not exceed 5 percent of the amount allotted to the jurisdiction for any fiscal year, or $35,000, whichever is greater.

(Authority: 20 U.S.C. § 1411(e))

Reports

§ 300.750 Annual report of children served—report requirement.

(a) The SEA shall report to the Secretary no later than February 1 of each year the number of children with disabilities aged 3 through 21 residing in the State who are receiving special education and related services.

(Authority: 20 U.S.C. § 1411(a)(3))

(b) The SEA shall submit the report on forms provided by the Secretary.

Approved by the Office of Management and Budget under control number 1820-0043.

(Authority: 20 U.S.C. § 1411(a)(3))

Note: It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make FAPE available. For example, while section 611(a)(5) of the Act limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged 3 through 17 (in States that serve all children with disabilities aged 3 through 5) or 5 through 17 (in States that do not serve all children with disabilities aged 3 through 5), a State might find that 14 percent (or some other percentage) of its children have disabilities. In that case, the State must make FAPE available to all of those children with disabilities.

§ 300.751 Annual report of children served—information required in the report.

(a) In its report, the SEA shall include a table that shows

(1) The number of children with disabilities receiving special education and related services on December 1 of that school year;

(2) The number of children with disabilities aged 3 through 5 who are receiving FAPE;

(3) The number of those children with disabilities aged 6 through 21 within each disability category, as defined in the definition of "children with disabilities" in § 300.7; and

(4) The number of those children with disabilities aged 3 through 21 for each year of age (3, 4, 5, etc.).

(b) For the purpose of this part, a child's age is the child's actual age on the date of the child count: December 1.

(c) The SEA may not report a child aged 6 through 21 under more than one disability category.

(d) If a child with a disability aged 6 through 21 has more than one disability, the SEA shall report that child in accordance with the following procedure:

(1) A child with deaf-blindness must be reported under the category "deaf-blindness."

(2) A child who has more than one disability (other than deaf-blindness) must be reported under the category "multiple disabilities."

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(Authority: 20 U.S.C. §§ 1411(a)(3); (5)(A)(ii); 1418(b))

§ 300.752 Annual report of children served—certification.

The SEA shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of children with disabilities receiving special education and related services on the dates in question.

(Authority: 20 U.S.C. §§ 1411(a)(3); 1417(b))

§ 300.753 Annual report of children served—criteria for counting children.

(a) The SEA may include in its report children with disabilities who are enrolled in a school or program that is operated or supported by a public agency, and that either—

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefitting from that special education.

(b) The SEA may not include children with disabilities in its report who—

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefitting from special education;

(4) Are counted by a State agency under subpart 2 of part D of chapter 1 of Title I of the Elementary and Secondary Education Act of 1965; or

(5) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under § 300.186(b).

(Authority: 20 U.S.C. §§ 1411(a)(3); 1417(b))

Note 1: Under paragraph (a) of this section, the State may count children with disabilities in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

Note 2: Special education, by statutory definition, must be at no cost to parents. As of September 1, 1978, under the FAPE requirement, both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Department expects that there would only be limited situations where special education would be clearly separate from regular education—generally, where speech services is the only special education required by the child. For example, the child's parents may have enrolled the child in a regular program in a private school, but the child might be receiving speech services in a program funded by the LEA. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in section 613(a)(4)(A) of the Act regarding private schools) to public agencies to provide services to children enrolled by their parents in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that if a public agency places or refers a child with a disability to a public or private school for educational purposes, special education includes the entire education program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special education. If an SEA or LEA is responsible for serving these children, and does provide them special education and related services, they may be counted.

§ 300.754 Annual report of children served—other responsibilities of the State educational agency.

In addition to meeting the other requirements of §§ 300.750-300.753, the SEA shall

(a) Establish procedures to be used by LEAs and other educational institutions in counting the number of children with disabilities receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the SEA to ensure that the State complies with § 300.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under §§ 300.750-300.753; and

(e) Ensure that documentation is maintained that enables the State and the Secretary to audit the accuracy of the count.

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(Authority: 20 U.S.C. §§ 1411(a)(3); 1417(b))

Note: States should note that the data required in the annual report of children served are not to be transmitted to the Secretary in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

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